

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 583

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, PETITIONER

vs.

MOHAWK WRECKING AND LUMBER COMPANY, A
PARTNERSHIP, AND HARRY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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In District Court of the United States for the Eastern District of
Michigan, Southern Division

Civil Action No. 5630

IN THE MATTER OF MOHAWK WRECKING & LUMBER COMPANY,
A PARTNERSHIP, AND HARRY SMITH

PAUL A. PORTER, APPELLANT

vs.

MOHAWK WRECKING & LUMBER COMPANY, A PARTNERSHIP, AND
HARRY SMITH, APPELLEES

Notice of appeal

Filed April 19, 1946

Paul A. Porter, Administrator of the Office of Price Administration, Applicant and Appellant, hereby takes an appeal to the Circuit Court of Appeals, Sixth Circuit, from the Final Order entered herein April 16, 1946, which Order denied Appellant's Application for an Order to compel compliance with a Subpoena issued by the Office of Price Administration and which Order was entered by the Honorable Arthur A. Koscinski, District Judge.

MILTON KLEIN,
*Director Litigation Division,
Enforcement Department,
Office of Price Administration,
Washington 25, D. C.*

THERON M. HALL,
*District Enforcement Attorney,
Office of Price Administration,
600 Griswold Street, Detroit 20, Michigan,
Counsel for Appellant,*

Dated: The 19th day of April 1946.

In United States District Court

Designation of record

Filed April 19, 1946

Paul A. Porter, Administrator of the Office of Price Administration, through his counsel, hereby designates for incorporation in the record on appeal taken by him from the final order entered

in the within cause on April 16th, 1946, which Order denied appellant's application for an order to compel compliance with a subpoena issued by the Office of Price Administration, the entire record and all of the proceedings and evidence in the action.

MILTON KLEIN,
Director Litigation Division,
Enforcement Department,
Office of Price Administration,
Washington 25, D. C.

Theron M. Hall,
District Enforcement Attorney,
Office of Price Administration,
600 Griswold Street, Detroit 26, Michigan,
Counsel for Appellant.

The undersigned attorneys for the defendant in the above entitled cause hereby acknowledge receipt of the above designation of record.

JOHN W. BABCOCK,
Attorney for Defendant.

Dated at Detroit, Michigan, this 19th day of April A. D. 1946.

3 In United States District Court

[Title omitted.]

Application of Paul A. Porter, Administrator of the Office of Price Administration, for an order compelling compliance with a subpoena issued by the Office of Price Administration

Filed March 18, 1946

1. The applicant, Paul A. Porter, is the Price Administrator of the Office of Price Administration, duly appointed, and makes this application through his attorneys.

2. The Mohawk Wrecking and Lumber Company is a partnership consisting of Harry Smith and Harry Jaffa, and Harry Smith is one of the copartners of the said copartnership; and that the said copartnership has offices at 14525 West Chicago Boulevard in the City of Detroit, County of Wayne, and State of Michigan.

3. In the course of the investigation being conducted by the Office of Price Administration into alleged violations by the Mohawk Wrecking & Lumber Company of Maximum Price Regulation 215, Maximum Price Regulation 26, and General Maximum Price Regulation, a Subpoena duces tecum was issued to the Mo-

hawk Wrecking & Lumber Company, Harry Smith, and Harry Jaffa, a copy of which is attached hereto and marked "Exhibit A." Said Subpoena was duly served on the 9th day of January 1946, on Harry Smith, one of the copartners of the said Mohawk Wrecking & Lumber Company.

4 4. On to wit: January 11, 1946, said Harry Smith appeared in response to the said Subpoena and filed a Claim of Exemption under the Compulsory Testimony Act and requested an adjournment to enable him to assemble the records to be produced by the said Subpoena; and at his request, the matter was adjourned to January 25, 1946.

5. On January 25, 1946, neither the said Harry Smith nor any representative of the Mohawk Wrecking & Lumber Company appeared. A telephone call was received requesting adjournment until February 4, 1946, and on February 4, no appearance was made nor has any explanation of the nonappearance of Mohawk Wrecking & Lumber Company or Harry Smith been made since that date.

Wherefore, the applicant prays:

(1) That the Court issue an Order requiring the Respondents and each of them to appear at the Detroit District Office of the Office of Price Administration and to produce all records required to be produced by the Subpoena of January 11, 1946, or in the alternative, to make such records fully available for inspection by a duly authorized representative of the Office of Price Administration at their place of business.

(2) That the Applicant may have such other and further relief as the circumstances may require.

PAUL A. PORTER,
Price Administrator,
Office of Price Administration.
By THERON M. HALL,
District Enforcement Attorney.
ARTHUR J. SCHUCK,
Enforcement Attorney.

Dated: At Detroit, Michigan, this 7th day of March 1946.

5 *Exhibit A to application*

United States of America
Office of Price Administration.

SUBPOENA

TO MOHAWK WRECKING & LUMBER COMPANY.

HARRY SMITH and HARRY JAFFA.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Arthur J.

Schuck, of the Office of Price Administration, at 600 Griswold Street, in the City of Detroit, County of Wayne, State of Michigan, on the 11th day of January, 1946, at 9 o'clock A. M. of that day, and bring with you all 1945 purchase invoices on lumber; bills of lading on lumber; all cash and charge sales invoices April 1, 1945, to December 31, 1945, inclusive; all lumber inventory records for the past 18 months.

Fail not at your peril.

In testimony whereof, the undersigned, an officer designated by the Price Administrator of the Office of Price Administration, has hereunto set his hand at Detroit, Michigan, this 9th day of January 1946.

(Sgd.) W. E. FITZGERALD.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served by the undersigned on January 9, 1946, at 2:30 P. M. to Harry Smith, copartner of the Mohawk Wrecking & Lumber Company.

(Sgd.) WAYNE H. PRICE, Investigator.

6 [Duly sworn to by Arthur J. Schuck; jurat omitted in printing.]

7 In United States District Court

[Title omitted.]

Answer of respondent to rule to show cause

Filed March 25, 1946

Now comes the above-named Mohawk Wrecking & Lumber Company, a Partnership, and the above named Harry Smith, and for Answer unto the Rule to Show Cause entered in the matter above entitled; and unto the Application therefor, according to the words and terms of the document as served upon the respondent, respectfully shows unto the Court as follows:

1. Answering paragraph 1 of the Application of the applicant respondent shows unto the Court that he has no personal knowledge of the accuracy or truth of the allegations therein contained, and no information regarding the same other than newspaper accounts, and hence, only upon information and belief admits such allegations to be true.

2. Answering paragraph 2 of said Application, respondent admits the allegations therein contained.

3. Answering paragraph 3 of said Application, respondent has no personal knowledge or means of knowledge or information upon which to form a belief regarding the reason or cause for the purported and apparent issue of a document called "subpoena duces tecum" and, therefore, neither admits nor denies such part of the allegations in paragraph 3 of said application.

8 Further answering said paragraph 3 of said allegation, respondent denies that "a subpoena duces tecum was issued to the Mohawk Wrecking and Lumber Company, Harry Smith and Harry Jaffa," and denies that a "subpoena was duly served on the 9th day of January 1946, on Harry Smith, one of the co-partners of the Mohawk Wrecking and Lumber Company."

Further answering the allegations of said paragraph 3 in said application, respondent admits that a document similar in form and substance to the copy of a document apparently attached to said Application was handed to Respondent Harry Smith on or about the 9th day of January A. D. 1946, but denies that said document is in any sense a subpoena within the intent and meaning of any of the laws of the United States.

4. Answering paragraph 4 of said Application, respondent admits that on the 11th day of January A. D. 1946, the said respondent Harry Smith appeared at the Office of Price Administration at 600 Griswold Street, Detroit, Michigan, and at such time and place delivered to Mr. Arthur J. Schuck in writing, his claim that the testimony requested of him and the production of the records requested of him, if insisted upon, would amount to compelling him to give testimony against himself and to act as a witness against himself, and amount to compelling self-incrimination, and that if the giving of such testimony and the surrender of such records were insisted upon, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, should apply with respect to the said undersigned, all of which and further in the nature of the claim then made by respondent, will appear by copy of such document attached hereto, marked "Exhibit A," and made a part hereof.

Further answering said paragraph 4 of said Application, respondent admits that on this occasion he advised the said Arthur J. Schuck that he would need further time to gather together and have available any of the books and records of his business such as purported to be described in the document called "subpoena duces tecum" which had been delivered to him, the said respondent, and that thereupon it was agreed that any

further hearing or discussion of the matter would be adjourned or continued until the 24th day of January 1946.]

5. Answering paragraph 5 of said Application, respondent admits that on January 25, 1946, neither respondent nor anyone in his behalf, made a physical appearance at the Office of Price Administration, but further answering said paragraph shows unto the Court that such nonappearance was the result of an agreed arrangement made between Arthur J. Schuck and respondent's attorney that said matter would be continued, and adjourned until the 4th day of February 1946.

Further answering said paragraph 5, respondent admits that on the 4th day of February 1946, he did not appear at the Office of Price Administration, but denies that no "explanation of the nonappearance" has been made since that date, and further answering said allegation in said paragraph 5, shows unto the Court that on the 1st day of February 1946, respondent's attorney wrote and mailed to the Office of Price Administration a letter of explanation, a copy of which is attached hereto, marked "Exhibit B," and made a part of this Answer.

Further answering said application, respondent insists that there is no provision in law by which any authority can compel by subpoena a partnership to make any appearance, produce any records, or give any testimony; that a partnership is not an entity separate and distinct from the individual persons who compose it, and that any process, orders, directives, or requirements must be imposed or served upon individual persons; and that as indicated by the complete record in this matter, there has been upon the part of these respondents neither a valid, lawful and proper subpoena issued and served, nor any evidence of contumacy or refusal to obey any subpoena of the Price Administrator of the Office of Price Administration, and that this Court is without jurisdiction to enter the Order requested by the Applicant, or any other Order upon the showing made in the matter pending before the Court and, therefore, respondents respectfully move that the said proceedings may be dismissed and the respondents discharged therefrom.

Dated at Detroit, Michigan, this 22nd day of March A. D. 1946.

MOHAWK WRECKING & LUMBER COMPANY,

HARRY SMITH,

By BROWN, FENLON & BABCOCK,

Their Attorneys.

By JOHN W. BABCOCK.

*Exhibit A to answer*DETROIT, MICHIGAN, *January 11, 1946.*

PRICE ADMINISTRATOR.

Office of Price Administration, Detroit, Michigan.

Attention: W. E. Fitzgerald, Arthur J. Schuck, Enforcement Attorney.

The undersigned hereby appears at your office in response to your subpoena duces tecum dated January 9, 1946, and assures you of his availability in response to your subpoena. You will please be advised, however, that the undersigned claims that the testimony requested in said subpoena, if insisted upon, shall amount to compelling the undersigned to give testimony against himself, and to act as a witness against himself, and amounts to compelling self-incrimination, and that if the giving of
11 such testimony and the surrender to you for examination of such records is insisted upon, then the immunity provisions of the Compulsory Testimony Act of February 11, 1933, shall apply with respect to the undersigned, and the undersigned claims and will claim that thereafter he shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, item, information, fact, data, or thing which may be included within, evolved from, developed from, suggested by, or established by any of such testimony so insisted upon, or any of the transactions, facts, information, things, or data included within or taken from such records, and/or concerning which the undersigned may testify or produce evidence, documentary or otherwise, all by reason of the provisions of the Constitution of the United States and of the Acts of Congress in such case made and provided:

The foregoing expression of availability on the part of the undersigned must not be construed as a waiver upon the part of the undersigned to object to the validity or the legal effect and force of any subpoena signed by any one other than the Price Administrator of the Office of Price Administration nor construed as an admission that the undersigned can testify or can bring and produce the records as directed in said subpoena.

HARRY SMITH.

Exhibit B to answer.

LAW OFFICES

BROWN, FENLON & BABCOCK

Prentiss M. Brown. Brown, Fenlon, Lund & Babcock.
 Edward H. Fenlon. Washington, D. C.
 John W. Babcock. Wendell Lund, Resident Partner.
 David A. Goldman. A. Manning Shaw, Business Consultant.

PENOBSCOT BUILDING,
 DETROIT 26, MICHIGAN,

February 1, 1946.

OFFICE OF PRICE ADMINISTRATION,
 600 Griswold Street, Detroit 26, Michigan.
 Attention. Mr. W. E. Fitzgerald, District Director.

Re: Mohawk Wrecking & Lumber Company. Harry Smith and
 Harry Jaffa

GENTLEMEN: I am addressing this communication to you with particular references to the subpoena duces tecum apparently issued out of your office January 9, 1946, and directing appearance before Arthur J. Schuck on January 11th at 9:00 o'clock in the forenoon. This subpoena was served upon Mr. Harry Smith and in response thereto he did appear before Mr. Schuck on January 11th as directed. The matter was then adjourned by agreement until January 25th to allow Mr. Smith to check into the matter of getting together the documentary evidence described in the subpoena. Between January 11th and January 25th, it was necessary for Mr. Harry Smith to make a business trip to the State of Washington and transportation difficulties prevented his return to Detroit in time for a second appearance at your office on January 25th. This advice was given by 'phone to your Mr. Schuck and he agreed if we would set forth these circumstances in a letter addressed to you, the hearing would be further continued until February 4th.

As far as Mr. Harry Smith is concerned, you will please be advised that he has no intention or desire to disobey, or to refuse to obey, any proper subpoena served upon him, or to be guilty of contumacy in connection therewith, or in connection with any other proper order or directive of any lawful Government official. There are, however, two or three features about the initiation of the proceedings apparently indicated by the subpoena above mentioned, which Messrs. Smith and Jaffa desire to bring to your attention, and concerning which they desire to make a formal record. The first of these is that Messrs. Smith and Jaffa have

grave doubts about your authority as District Director to issue a subpoena in view of the fact that the Act of Congress in question directs that the Administrator may, by subpoena, require and person engaged in the business of dealing with any commodity, to appear and testify, or to appear and produce documents, or both. If, however, you can direct our attention to any order issued by the Administrator conferring specific authority to issue subpoena upon the District Director, we shall be glad to give consideration to the legal effect of such order.

In addition to this question, however, if you did not know it before, this will advise you, that Messrs. Smith and Jaffa are partners in the conduct of the business of the Mohawk Wrecking and Lumber Company. It is our opinion that where a business is operated and conducted by a partnership, there are well defined immunity rights inherent to citizenship of the United States and possessed by individuals in this conduct of their business as individuals, or in the conduct of a business as partners, and that

14 such immunity rights can be invaded by representatives of the Government of the United States only when appropriate provision is made for the protection of the individual citizen. Thus, the very Act of Congress under the authority of which your subpoena was issued, expressly provides that "the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

It appears to us rather fundamental that before any action is taken to require the production of books, records and documents of individual persons engaged in business, each and all of such persons should be extended the opportunity to claim the privilege provided by law. It seems to us also, that the question of their making claim to such privilege should not be imposed upon them unless and until they have first had the benefit and the courtesy of service upon them individually, of any subpoena with which compliance is requested. In other words, to be more specific, regardless of the service upon Mr. Smith of your subpoena, Mr. Harry Jaffa ought not to be placed in a position potentially dangerous by volunteering to subject himself to the consequences of a matter in which he has not been made a party by the service upon him of appropriate process or directive.

With the purpose in mind of making a record of the position of these gentlemen, and of indicating the conditions which we feel they have a right to insist upon, before it can be said that they have been guilty of contumacy or refusal to obey your subpoena, if it is still your desire to have produced the items described in your subpoena of January 9th, we respectfully request that a valid and proper subpoena be served upon each and both of said partners and

that each and both of them be extended the opportunity to claim his privilege under the Constitution and the Acts of Congress before there be required the production of any books, records and documents of the Mohawk Wrecking Company. It so happens that at the present time the business of the Mohawk Wrecking Company has Mr. Jaffa at Richland, in the State of Washington. In order that no one may feel we are merely trying to postpone this matter, we suggest to you that if you desire to proceed with this matter and if you will have a proper subpoena served upon Mr. Jaffa, and thereafter extend to him the opportunity to file his claim of privilege in writing, we will not insist upon his personal appearance before your Mr. Schuck prior to arranging for Mr. Smith to turn over to your representatives the items described in your subpoena. In view of this position and of the suggestions which we have made herein, Mr. Smith will not appear at your office on February 4th, but will hold himself available for such further conferences as our further negotiations may develop to insure mutually the rights of these two citizens as well as the rights and obligations of the United States Government.

Respectfully yours,

BROWN, FENLON & BABCOCK.
By JOHN W. BABCOCK.

JWB:ml.

16

In United States District Court

[Title omitted.]

Affidavit of John W. Babcock

STATE OF MICHIGAN,

County of Wayne, ss:

John W. Babcock, being duly sworn, deposes and says that he is an attorney-at-law, duly admitted to practice in the Courts of the State of Michigan and before The United States District Court for the Eastern District of Michigan.

Deponent further says that in such capacity he has been representing and advising the Mohawk Wrecking and Lumber Company and Mr. Harry Smith in connection with business problems of said client.

Deponent further says that on or about the 23rd day of January A. D. 1946, he had a telephone conversation with Mr. Arthur J. Schuck of the Office of Price Administration, during which deponent advised said Arthur J. Schuck that important business had taken Mr. Harry Smith to the State of Washington and that deponent had been informed that Mr. Harry Smith was experienc-

ing difficulty in procuring transportation back to Detroit and would be unable to return to the City of Detroit in time to make an appearance in the Office of Price Administration on the 25th day of January 1946.

17 Deponent further says that thereupon it was agreed between deponent and said Arthur J. Schuck that further conference and hearing relative to the matter of the Mohawk Wrecking and Lumber Company would be continued and adjourned until the fourth day of February 1946.

Deponent further says that thereafter deponent gave further study and thought to the questions and principles of law involved in the matter of administrative process issued by the Office of Price Administration, particularly as it applied to the affairs of the Mohawk Wrecking and Lumber Company, and that on the first day of February 1946, deponent dictated, had transcribed and caused to be mailed in the normal use of the United States Mails, a letter addressed to Office of Price Administration, a copy of which is attached to the respondent's Answer in the matter above entitled, and marked "Exhibit B."

Deponent further says that he has had neither communication nor telephone call from anyone representing the Office of Price Administration relative to the matters of the Mohawk Wrecking and Lumber Company since the mailing of said letter of February 1, 1946, until the delivery to deponent by his client of the copy of Order to Show Cause and Application to which answer is herewith being made.

Further deponent says not.

JOHN W. BARCOCK.

Subscribed and sworn to before me, this 22nd day of March A. D. 1946.

MARGARET M. LOOK.

Notary Public, Wayne County, Michigan.

My commission expires October 11, 1949.

18

In United States District Court

[Title omitted.]

Opinion denying application for order compelling compliance with subpoena duces tecum

Filed April 12, 1946

The Office of Price Administration issued a subpoena duces tecum directed to Mohawk Wrecking and Lumber Company, Harry

Smith and Harry Jaffa requiring them to appear before Arthur J. Schuck of the Office of Price Administration at 600 Griswold Street in the City of Detroit on the 11th day of January 1946, with certain business records therein described. The subpoena is tested as follows:

"In testimony whereof, the undersigned, an officer designated by Price Administrator of the Office of Price Administration, has hereunto set his hand at Detroit, Michigan, this 9th day of January 1946.

(Sgd.) W. E. FITZGERALD.

Return of service indicates that the subpoena was served on January 9, 1946, on Harry Smith—copartner of the Mohawk Wrecking and Lumber Company.

Under date of March 18, 1946, the Price Administrator, through his attorney, filed application in this court for an order compelling compliance with the subpoena so issued:

19 The respondents, in their answer to the Administrator's application, challenge the Administrator's authority to delegate the power of issuing subpoenas to a subordinate, and this court's jurisdiction to enter the order requested.

Under 50 U. S. C. A. App. (922-b) the Administrator is authorized to "whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

For validity of delegated power of subpoena applicant relies on 50 U. S. C. A. App. 921 (b), which provides:

"(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

In Cudahy Packing Co. v. Holland, 315, U. S. 357, the Court had before it precisely the same question under the fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. Sec. 201 (29 U. S. C. A. Sec. 901 et seq.)—the authority of the Administrator of the Wage and Hour Division of the Department of Labor to delegate his statutory power to sign and issue a subpoena tecum.

The force of authority claimed for delegation of the subpoena power in the Cudahy case was Section 4 (c), 29 U. S. C. A. Sec. 204 (c), which is as follows:

"(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place."

This clause is nearly identical with 50 U. S. C. A. App. Sec. 921 (b) of the Emergency Price Control Act of 1942. In construing

the meaning of that clause the Court said in the Cudahy case (p. 360) :

"On its face this seems no more than a definition of the geographical or territorial jurisdiction of the Administrator and his representatives."

20 The subpoena power under the Fair Labor Standards Act is found in 50 U. S. C. A. App. Section 209, which makes Sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents) applicable to the jurisdiction, powers, and duties of the Administrator. The relevant provision of the Federal Trade Commission Act referred to is Section 49 and provides:

"And the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence."

The members of the Commission were specifically designated to sign subpoenas and though under Section 43 of that Act the Commission was authorized to exercise its powers through examiners appointed by it, "in any part of the United States," the power of subpoena was not granted to such examiners.

After reviewing Congressional legislation in which power of subpoena was either expressly granted or withheld by Congress, Chief Justice Stone said (p. 336 of Cudahy case) :-

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegatable only when an authority to delegate is expressly granted."

Unless, therefore, there are features in this case distinguishing it from the ruling made in the Cudahy case, the same rule must here be applied.

It is argued on behalf of the Administrator that the Emergency Price Control Act of 1942 under which this application is made has been specifically labeled by Congress as an "emergency"

21 law and that the Administrator is charged with carrying out the purposes of the Act as expressed by Congress with the least possible delay to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other destructive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency, and further to prevent undue impairment of the national standard of living; to prevent hardship which would result from abnormal increases in prices, and to prevent the post emergency collapse of values—

all as expressed in Section 901 of the Act; that the authority to conduct hearings under Section 922 would be unduly curbed and delayed if the right to conduct such investigations and hearings were dependent or conditioned on obtaining subpoena signed by the Price Administrator; that being an emergency Act the law is one of temporary duration and that in that respect it differs from the Fair Labor Standards Act which is a permanent piece of legislation and not passed as an emergency measure, and that, furthermore, in the adoption of the Fair Labor Standards Act Congress specifically struck out the clause delegating the subpoena power to a subordinate and that such an intention on the part of Congress does not appear in the adoption of the Emergency Price Control Act; that, therefore, under Section 921 (b) Congress intended to grant authority to the Price Administrator for delegation of the subpoena power.

These arguments might under other circumstances be persuasive. But the language of the Cudahy case compels a denial here of the Administrator's assumed authority to delegate the power of subpoena.

To quote further from the opinion in that case:

(p. 363):

"Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

22 (p. 364):

"The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power. The Interstate Commerce Act, the National Labor Relations Act, and the Federal Trade Commission Act, whose subpoena provisions were adopted by the present Act and by the Packers and Stockyards Act, all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas. On the other hand, Congress, in numerous cases, has specifically authorized the delegation of the subpoena power. In others it has granted the power to particularly designated subordinate officers or agents, thus negating any implied power in the head to delegate generally to subordinates."

To the Administrator's argument that his application is made under an "emergency" law and that therefore any action taken by

him under that law should not be unduly delayed, it is enough to say that the subpoena in question here was served on January 9, 1946, but it was not until March 18, 1946, that application was made to this court for compelling obedience to it. There was no such emergency here as claimed by the Administrator to necessitate speed in the proceedings. A subpoena signed by the Price Administrator himself could have been obtained and served with less delay.

This court, therefore, being without jurisdiction in the matter, the application of the Price Administrator is denied.

In view of this ruling other questions raised by the pleadings need not be passed upon in this proceeding.

ARTHUR A. KOSCINSKI,
U. S. District Judge.

In United States District Court

[Title omitted.]

Order denying application for order compelling compliance with subpoena

Entered April 16, 1946

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 16th day of April A. D. 1946.

Present: Honorable ARTHUR F. KOSCINSKI, U. S. District Judge.

In the above-entitled matter Enforcement Attorneys for the Honorable Paul A. Porter, Price Administrator, Office of Price Administration, having presented an Application for an Order requiring obedience to an alleged administrative subpoena, and the respondents having filed their Answer to said Application denying the validity of said subpoena and the jurisdiction of this Court to enter the Order applied for, the matter having been heard in open Court and argued by counsel for the respective parties, and the Court having taken the matter under advisement and duly considered all of the issues involved in the premises, now, therefore,

It is ordered and adjudged that said Application be and the same hereby is dismissed and denied.

ARTHUR A. KOSCINSKI,
U. S. District Judge.

24 [Clerk's certificate to foregoing paper omitted in printing.]

In United States District Court

Stipulation re comparison of record

Filed May 10, 1946

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

MILTON KLEIN,
*Director Litigation Division,
Enforcement Department,
Office of Price Administration,
Washington 25, D. C.*

THURON M. HALL,
*District Enforcement Attorney,
Office of Price Administration,
600 Griswold Street, Detroit 26, Michigan,
Counsel for Appellant.*

JOHN W. BABCOCK,
*Attorney-at-Law,
Penobscot Building, Detroit 26, Michigan,
Counsel for Appellee.*

Dated at Detroit, Michigan, this 10 day of May, 1946.

25 [Clerk's certificate to foregoing transcript omitted in
printing.]

26 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted

June 1, 1946

Before: SIMONS, ALLEN, and MILLER, JJ.

This cause is argued by Samuel Mermin for Appellant and by
John W. Babcock for Appellee and is submitted to the court.

In United States Circuit Court of Appeals

Judgment

Entered August 12, 1946

Appeal from the District Court of the United States for the
Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

United States Circuit Court of Appeals, Sixth Circuit

No. 10254

PAUL PORTER, PRICE ADMINISTRATOR, APPELLANT

v.

MOHAWK WRECKING & LUMBER COMPANY, A PARTNERSHIP, AND
HARRY SMITH, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

Opinion

Filed August 12, 1946

Before SIMONS, ALLEN, and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal by the Price Administrator of the Office of Price Administration is from an order of the District Court denying an application under § 202 (e) of the
27 Emergency Price Control Act for an order compelling compliance with a subpoena. § 922 (e) Title 50 App. U. S. C. A.

In the course of an investigation being conducted by the Office of Price Administration into alleged violations by the appellee, Mohawk Wrecking and Lumber Company, of MPR 215, MPR 26, and GMPR, a document purporting to be an administrative subpoena, duces tecum was issued on January 9, 1946 to said Company and the copartners thereof, Harry Smith and Harry Jaffa. It was served on Harry Smith on January 9, 1946, and by its terms directed him to appear before Arthur J. Schuck of the Office of Price Administration in Detroit, Michigan, on January 11, 1946, and to bring with him certain documents designated therein. The designated hearing was adjourned by agreement first to January 25, 1946, and then to February 4, 1946, on which later date no appearance was made by Mohawk Wrecking & Lumber Company or by Harry Smith. The subpoena in question was executed as follows:

"In testimony whereof, the undersigned, an officer designated by the Price Administrator of the Office of Price Administration,

has hereunto set his hand at Detroit, Michigan, this 9th day of January 1946.

(Sgd.) W. E. FITZGERALD."

W. E. Fitzgerald (who signed the subpoena, was the District Director of the Office of Price Administration, authorized to sign subpoenas by the Administrator's Revised Order 53 issued on May 13, 1944 (9 FR 5191).

On March 7, 1946, the Administrator, through his district enforcement attorney, applied for an order in the District Court under § 202 (e) of the Act requiring the respondents to appear at the Detroit office of the Office of Price Administration and to produce all records required to be produced by the previously issued subpoena. The application was denied by the District Judge on the ground that there was no authority under the Price Control Act for the Administrator's delegation to the district director of the authority to sign and issue subpoenas. Other issues presented by the pleadings were not passed upon and are not involved in this appeal.

The Emergency Price Control Act, by § 202 (a) [§ 922 (a) Title 50 App. U. S. C. A.], authorizes the Administrator to make such studies and investigations as he deems necessary to assist him in prescribing any regulation or order under the Act. § 202 (c) of the Act [§ 922 (c) Title 50 App. U. S. C. A.], provides—
 "For the purpose of obtaining any information under subsection a, the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place." The appellant claims that his authority to delegate to regional and district directors the power to issue subpoenas is conferred by the following provisions of § 201 of the Act. § 201 (a) [§ 921 (a) Title 50 App. U. S. C. A.], provides in part as follows:

"The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, * * *

§ 201 (b) [§ 921 (b) Title 50 App. U. S. C. A.], provides in part as follows:

"The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

§ 201 (d) [§ 921 (d) Title 50 App. U. S. C. A.], provides as follows:

"The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

The District Judge was of the opinion that his ruling was controlled by the opinion of the Supreme Court in *Cudahy Packing*

Company v. Holland; 315 U. S. 357, where the Supreme Court had before it precisely the same question under the Fair Labor Standards Act, involving the authority of the Administrator of the Wage and Hour Division of the Department of Labor to delegate his statutory power to sign and issue a subpoena duces tecum. In that case the Supreme Court held that the Administrator did not have the authority to delegate such power to a regional director of the Wage and Hour Division. Appellant contends that the present case, arising under the Emergency Price Control Act instead of under the Fair Labor Standards Act, involves sufficient differentiating features to make that ruling inapplicable.

A consideration of the wording of the statutory provisions involved in the Cudahy case and of the broad scope of the principles announced by the opinion in that case shows how closely in point is the ruling of that case. The Fair Labor Standards Act contains in almost identical language the same provisions as are quoted above from §§ 201 (a) and 201 (b) of the Emergency Price Control Act. The Administrator of the Wage and Hour Division under the Fair Labor Standards Act is given authority to issue orders containing such terms and conditions as he finds necessary to carry out the purposes of such orders and to prevent the circumvention or evasion thereof, similar to the authority given to the Price Administrator, although the wording in the Fair Labor Standards Act is somewhat different from the wording of § 201 (d) of the Emergency Price Control Act quoted hereinabove. The Supreme Court held that such provisions in 29 the Fair Labor Standards Act, two of them being practically identical in wording with the provisions in the Emergency Price Control Act herein relied upon by the Price Administrator, did not confer upon the Administrator the authority to delegate his power to issue subpoenas, in that the power to so delegate was not expressly granted. It based its ruling upon a broad general rule of administrative law that the subpoena power can not be delegated by implication and that the right to delegate exists only when the authority to so delegate is expressly granted. In reviewing the statutes creating numerous administrative agencies, including the Interstate Commerce Act, the National Labor Relations Act, the Federal Trade Commission Act, the Packers and Stockyards Act, Veterans Administration Act, Railroad Unemployment Insurance Act, Walsh-Healey Act, Merchant Marine Act, Federal Power Act, Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Act, Communications Act, Bureau of Marine Inspection and Navigation Act, Civil Aeronautics Act of 1938, Motor Carrier Act and Longshoremen's and Harbor Workers' Comp. Act, the Court

summed up the rule of administrative law flowing from such legislation as follows:

"The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power." (Page 364.)

Further considering the same question, the Court repeated the rule in the following language:

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted."

That such is the real basis of the ruling is made clear by the dissenting opinion in the case, which is devoted almost entirely to a vigorous dissent to such a principle of administrative law.

The Administrator's contention in the present case that the foregoing rule is not applicable because his authority to delegate the subpoena power is expressly conferred by the provisions of the Emergency Price Control Act set out hereinabove is directly contrary to the ruling of the Supreme Court in the Cudahy case that such provisions, practically identical in wording, did not expressly delegate such authority to the Administrator. Accordingly, unless the rule announced in the Cudahy case is to be set aside or modified, or unless distinguishing features in this case make it inapplicable, the Price Administrator lacked the claimed authority to delegate the subpoena power to the district director who issued the subpoena herein involved.

The Administrator contends, however, that the decision in the Cudahy case was based on the legislative history leading to
30 the enactment of the Fair Labor Standards Act, rather than the rule above referred to. He points out that Congress in finally enacting that legislation rejected the wording of the bill passed by the Senate which expressly authorized the Administrator to delegate the subpoena power and adopted instead the wording quoted hereinabove. It is urged that the legislative history of the Emergency Price Control Act is entirely different, in that it does not involve any such choice between conflicting provisions dealing with the subpoena power, but on the contrary shows that the Senate Committee on Banking and Currency in reporting out the Price Control Bill stated that §§ 201 (a) and 201 (b) of the Act authorized the Administrator to delegate any of the powers given to him by the bill. We believe the Administrator is in error in assuming that the Court's decision in the Cudahy case was based upon the legislative history of the Fair Labor Standards Act. The Court said that if the Act was construed so as to authorize the delegation of the subpoena power by implication it would result in giving the Administrator unrestricted authority to delegate

every other power which he possessed. Well considering the effect of such a construction, the Court ruled as it did with the following statement:

"A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words." (Page 361.)

It is true that the Court stated a few sentences thereafter that—"This construction is fully supported by the legislative history of § 4 (c)." This legislative history is then set out in a footnote instead of in the body of the opinion. It would thus seem that the legislative history was merely a supporting reason, rather than a primary reason, for the ruling by the Court. The fact that such legislative history does not exist in the present case in no way destroys the applicability of the primary reason upon which the Court's decision was really based. In this connection it is interesting to note that the dissenting opinion in the Cudahy case concedes that the case was not decided on the basis of its legislative history, in its statement that "There is no indication whatsoever that the choice of the House bill as against the Senate bill was in any way influenced by the presence in the latter of an express power of the proposed Board to delegate its subpoena power." (P. 371, 372.) Its attack on the majority opinion is directed against the ruling that the subpoena power cannot be impliedly delegated, clearly showing the interpretation it gave to the ruling.

31 The report of the Senate Committee on Banking and Currency in reporting out the Price Control Bill is entitled to consideration, but in view of the general language used therein and the fact that it is the report of only one of the two houses of Congress makes it merely one element to be considered among several and certainly not controlling. The report largely paraphrases §§ 201 (a) and 201 (b) of the Act, refers to the "powers" of the Administrator only generally, and, as is the case in the wording of the Act itself, makes no specific mention of the subpoena power. In any event, the view of the Senate Committee as to the legal effect of the words used in the Act is directly contrary to the later view of the Supreme Court in the Cudahy case. The construction placed upon those words by the Supreme Court came only a few weeks after the enactment of the Emergency Price Control Act. Yet in the several reenactments of the Act in subsequent years, neither the Senate Committee on Banking and Currency nor Congress itself added anything to the statute to show that Congress, in passing the Act, had in mind an interpretation different from that given by the Supreme Court.

The Administrator contends that the Emergency Price Control Act was administratively construed from the outset to permit the delegation of the power to issue subpoenas and that the action of Congress in subsequently reenacting the Act on June 30, 1944, and June 30, 1945, should be regarded as legislative ratification of the administrative construction. A review of the administration and enforcement of the Act since its original enactment on January 30, 1942, shows that the Act was not administratively construed from the outset to permit such delegation. It appears that a memorandum by the assistant general counsel for the Administrator was issued on March 26, 1942, construing the Act to permit such a delegation. However, the Administrator did not at that time act upon that opinion. The Administrator continued to sign and issue all subpoenas. On June 29, 1943, General Order 53 (8 FR 9037) was issued, delegating the authority to regional administrators and district directors to issue subpoenas which had been signed in blank by the Administrator. Finally, on May 13, 1944, revised Order 53 (9 FR 5191) was issued which delegated the functions of both signing and issuing subpoenas under the Price Control Act to regional administrators and district directors. Such administrative practice and the testimony of Mr. Fleming James, Jr., Director of the Litigation Division, Office of Price Administration, before the House of Representatives Committee to Investigate Executive Agencies on June 22, 1944, makes it clear that, in spite of the Administrator's present contention and confident argument in support thereof, there was a period of some two years during which real doubt existed in the Office of Price Administration of the Administrator's authority to delegate the subpoena power. The doubtful validity of delegating such authority caused the Administrator to refrain from its exercise for a period of more than two years, during which time no attempt was made to have Congress clarify the situation by amendatory legislation. If the Administrator really believed that it was the intention of Congress in enacting the Emergency Price Control Act to authorize him to delegate such power, it would seem that he would have exercised such power immediately or sought clarifying amendments to remove any existing doubt. Apparently, the Administrator finally took the position on May 13, 1944, when he assumed to exercise that authority, that he would attempt to obtain favorable action upon his contention by litigation rather than by Congressional action, in spite of the obvious delay and expense involved in the litigation that was certain to follow. Such administrative construction of the Act has very little, if any, weight. The rule contended for by the Administrator is at its best no more than an aid in statutory con-

struction. "While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can affect a change. * * * It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power." *Helvering v. Reynolds*, 313 U. S. 428, 432; *Helvering v. Wilshire Oil Company*, 308 U. S. 90, 100. In any event, such a rule, if it is to be applied in this case, supports the position of the appellee more strongly than the position of the Administrator. As pointed out above, shortly after the enactment of the Price Control Act the Supreme Court in the *Cudahy* case construed unfavorably to the Administrator's contention the statutory language now under consideration. With that interpretation definitely before it, Congress subsequently reenacted the Act on June 30, 1944, and June 30, 1945, without attempting to amend the language so as to give it a different meaning and effect.

The Administrator correctly argues that the above quoted provision from § 201 (a) of the Act unquestionably gives him the authority to delegate certain of "his functions and duties" under the Act. The language of the statute specifically so provides. Reference is made by him to *Bowles v. Griffin*, 151 Fed. (2d) 458, 5th Circuit, in which it was held that the Administrator could appoint a rent director for a defense area and delegate to him the authority to fix by orders maximum rents for housing accommodations therein, and to *Bowles v. Wheeler*, 152 Fed. (2d) 34, 9th Circuit, in which it was held that the Administrator had the authority

to delegate the suit-bringing function to any authorized representative. It is then contended that if certain functions and duties are delegable under the Act, and no differentiation is made by the Act between different functions and duties, it necessarily follows that all of his functions and duties, including the power to issue subpoenas, are delegable. The answer to that is that the Supreme Court in the *Cudahy* case had before it the same language and the same question and held that the statutory authority to delegate "his functions and duties" under the Act did not include the authority to delegate the subpoena power.

The Administrator also strenuously argues that his authority to delegate the subpoena power is to be inferred from the nature, character and extent of his duties, and that his administration and enforcement of the Act will be seriously handicapped unless such authority exists. This argument was also stressed by the dissenting opinion in the *Cudahy* case, but rejected by the majority opinion. We concede the existence and complexity of the multitudinous duties which the Price Administrator is

required to perform in order to successfully and effectively carry out the purposes of the Act. No doubt the authority to delegate the subpoena power would materially aid him in expeditiously performing those duties. Yet if we adhere to the rule that the subpoena power cannot be impliedly delegated, it is not a proper argument to be considered by this Court. It is a question of legislative policy, depending upon many various considerations, whether it is wise or unwise to give unlimited authority to an administrative officer to delegate the exercise of the subpoena power. As pointed out by the Supreme Court in the Cudahy case (pages 363, 364) such unlimited authority of an administrative officer "is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer," which is a cogent reason for granting such power "only to the responsible head of the agency." If such authority is necessary to make the administration and enforcement of the Act successful, Congress can at any time and in short order create such authority. The appellant's contention in this respect is sufficiently answered by the following closing words in the majority opinion in the Cudahy case:

"Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the
34 exercise of the subpoena power, and that this precludes our restoring it by construction."

The Administrator refers us to the four following opinions of different Circuit Courts of Appeals, all involving the same issue as is now presented to us and sustaining his contentions: *Pinkus and Segal v. Porter*, decided May 2, 1946, 155 Fed. (2d) 90, 7th Circuit; *Raley v. Porter*, decided June 17, 1946, — Fed. (2d) —, U. S. Circuit Court of Appeals, District of Columbia; *Porter v. Gantner & Mattern Company*, decided June 24, 1946, — Fed. (2d) —, 9th Circuit; *Porter v. Murray*, decided June 28, 1946, — Fed. (2d) —, 1st Circuit. We recognize the weight of those opinions. It is sufficient to say here that they hold that the decision of the Supreme Court in the Cudahy Packing Company case is not controlling due to the differentiating features involved in the Emergency Price Control Act, as contended for by the Administrator and as pointed out hereinabove. In our view that the ruling in the Cudahy Packing Company case does control the present situation,

we necessarily have to disagree. We fail to find any of the four opinions referred to any real recognition of the broad rule of administrative law pronounced by the opinion in that case, namely, that the subpoena power conferred by legislation upon the head of an administrative agency is delegable by him "only when an authority to delegate is expressly granted." As stated above, we believe that fundamental rule controls our decision in the present case.

The order of the District Court is accordingly affirmed.

[Clerk's certificate to foregoing transcript omitted in printing.]

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Supreme Court of the United States

No. 583, October Term, 1946

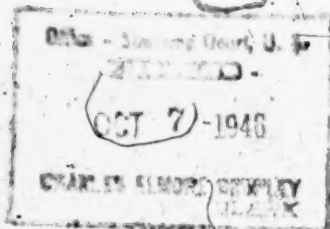
Order allowing certiorari

Filed November 12, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the question whether the Emergency Price Control Act authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas. The case is transferred to the summary docket and assigned for argument immediately following Nos. 483 and 512.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY



No. 583

In the Supreme Court of the United States

OCTOBER TERM, 1946

**PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, PETITIONER**

v.

**MOHAWK WRECKING AND LUMBER COMPANY, a
PARTNERSHIP, AND HARRY SMITH**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

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In the Supreme Court of the United States

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v.

**MOHAWK WRECKING AND LUMBER COMPANY, A
PARTNERSHIP, AND HARRY SMITH**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Paul A. Porter, Administrator of the Office of Price Administration, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled case, entered on August 12, 1946, affirming an order of the District Court denying an application under Section 202 (e) of the Emergency Price Control Act for an order compelling compliance with an administrative subpoena.

OPINIONS BELOW

The opinions of the District Court (R. 18) and Circuit Court (R. 26) have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 12, 1946 (R. 26). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the Emergency Price Control Act of 1942 authorizes the delegation by the Price Administrator, to District Directors, of the authority to sign and issue subpoenas for purpose of the investigative functions authorized by Section 202 of the Act.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by the Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App. Sec. 901 et seq., and Revised General Order 53 (9 F. R. 5191). The pertinent provisions are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

In the course of an investigation being conducted by the Office of Price Administration into alleged violations by the respondent company of Maximum Price Regulation 215 (8 F. R. 14145), Maximum Price Regulation 26 (8 F. R. 7570) and the General Maximum Price Regulation (7 F. R. 3153) a subpoena duces tecum was issued to

respondent company and the two co-partners, Harry Smith and Harry Jaffa (R. 5). The subpoena was served on Harry Smith on January 9, 1946 (R. 5). On January 11, Harry Smith appeared in response to the subpoena, filed a claim of exemption under the Compulsory Testimony Act (R. 10-11) and at his request an adjournment was granted to January 25, 1946 (R. 4). A further adjournment was later requested to February 4, 1946, which was also granted (R. 4). No appearance was made by the respondents on that date (R. 4). On February 1, 1946, counsel for the respondents wrote a letter to the Detroit office of the Office of Price Administration stating that service should have been made upon Harry Jaffa, who was then in the State of Washington, and stating that there were "grave doubts about your authority as District Director to issue a subpoena in view of the fact that the Act of Congress in question directs that the Administrator may by subpoena require any person engaged in the business of dealing with any commodity, to appear and testify, or to appear and produce documents, or both" (R. 12-15).

On March 18, 1946, the Administrator, through his District Enforcement Attorney, applied for an order in the District Court under Section 202 (e) of the Act requiring the respondents to appear at the Detroit office of the Office of Price Administration and to produce all records.

required to be produced by the previously issued subpoena, or in the alternative, to make such records fully available for inspection by a duly authorized representative of the Office of Price Administration at the respondents' place of business (R. 3-4).

The application was denied and dismissed by the District Court on April 16, 1946, on the ground that there was no authority under the Price Control Act for the Administrator's delegation to the District Director of the authority to sign and issue subpoenas (R. 18-23). The Circuit Court of Appeals affirmed (R. 26-34).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Sixth Circuit erred in affirming the District Court order denying the Administrator's application under Section 202 (e) of the Emergency Price Control Act to enforce an administrative subpoena on the ground that the Act did not authorize the Administrator to delegate the function of signing and issuing such subpoenas.

REASONS FOR GRANTING THE WRIT

1. As the court below admitted (R. 34), its decision conflicts with the decisions of four other Circuit Courts of Appeal. See *Pinkus and Segal v. Porter*, 155 F. 2d 90 (C. C. A. 7); *Porter v. Gantner and Mattern Company*, decided June 24, 1946 (C. C. A. 9); *Porter v. Murray*, decided

June 28, 1946 (C. C. A. 1); *Raley v. Porter*, decided June 17, 1946 (App. D. C.). Petitions for certiorari were filed in the *Raley* case on September 16, 1946 (*Raley v. Porter*, No. 512), and in the *Murray* case on September 9, 1946 (*Murray v. Porter*, No. 483).

These four decisions are supported by the language of Section 201, quoted below,¹ which was described in the Senate Committee Report as authorizing the Administrator to "perform his duties through such employees or agencies" as he was permitted to hire "by delegating to them *any of the powers* given to him by the bill." (S. Rep. 931, 77th Cong., 2d Sess., pp. 20-21). [Italics supplied.] The report further stated

¹ Section 201 (a) * * * The Administrator may, subject to the civil-service laws, appoint such *employees* as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. * * *

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act. [Italics supplied.]

that the Act authorized "the Administrator, or any representative or other agency to whom he may delegate *any or all* of his powers, to exercise such powers in any place." (*Ibid.*)

2. The court below nevertheless thought that *Cudahy Packing Co. v. Holland*, 315 U. S. 357, compelled it to reach a different conclusion from that of the other four circuits, although they had all specifically dealt with the *Cudahy* decision and concluded that it was not controlling. The opinion in the *Cudahy* case relied largely on specific manifestations in the history of the Fair Labor Standards Act of an intention not to delegate the subpoena power (see pp. 364, 366), such as incorporation by reference of the subpoena provisions of the Federal Trade Commission Act and the specific elimination from an earlier draft of the bill of authority to delegate the subpoena power. There is nothing comparable in the history of the Emergency Price Control Act, and the Committee Report, quoted *supra*, shows definitely that Congress intended to allow delegation of "any or all" of the Administrator's powers. That the *Cudahy* case did not mean to exclude the possibility of delegation of the subpoena power being authorized under general language such as is contained in Section 201 appears from one of the statutes cited as illustrative of what would be sufficient. See p. 365 n. 9 (Railroad Unemployment Insurance Act, 45 U. S. C. § 362 (a) (m)).

3. The decision of the court below works a substantial interference with the expeditious and orderly discharge of the investigative functions of the Office of Price Administration. The only alternatives to the delegation involved in the suit are (1) that the Administrator himself personally consider whether a subpoena should be issued in connection with the multitude of investigations carried on in all parts of the country—and it is significant that during 1945, approximately 750 investigations were completed per working day; or (2) that the Administrator sign the subpoenas in blank, and send quantities of such signed, blank subpoenas out to the various field offices for issuance by the local officials. The first alternative would impose an administratively impossible burden. The second alternative is also undesirable, for as was observed in *Raley v. Porter*, *supra*: “It is more prudent and orderly for subpoenas to be signed by the selected representatives who must exercise the discretion which their use involves. The difference between the one system and the other is like that between signing hundreds of blank checks for future use and authorizing selected representatives to sign checks from time to time. Congress did not forbid the more orderly practice which the Administrator adopted.”

Seventeenth Quarterly Report of the Office of Price Administration (1946) p. 104.

CONCLUSION


The decision of the court below conflicts with the decision of four other circuits, and is based on a misconstruction of a prior decision of this Court. The question is one of importance to the administration and enforcement of the Emergency Price Control Act. For these reasons a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MOGRATH,
Solicitor General.

GEORGE MONCHARSH:
*Deputy Administrator for Enforcement,
Office of Price Administration.*

OCTOBER 1946.



APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App., Supp. V, 901 et seq. are as follows:

TITLE II—ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of

officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. * * *

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings,¹ and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and

¹ The preceding four words added by Section 105(a) of the Stabilization Extension Act of 1944.

to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by

such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

(i) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.²

2. The provisions of Revised General Order 53 (9 F. R. 5191, May 13, 1944) are as follows:

General Order 53 is amended and revised to read as follows:

Pursuant to the authority conferred upon the Administrator by the Emergency

² Subsection (i) added by Sec. 105 (b) of Stabilization Extension Act of 1944.

Price Control Act of 1942 as amended, the following order is prescribed:

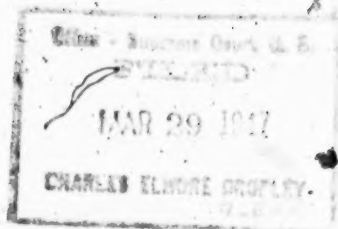
(a) *Order delegating authority to sign and issue subpoenas and inspection requirements in rent and price investigations.*—

In connection with any investigation related to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation or order issued thereunder, the several Regional Administrators and the several District Directors of the Office of Price Administration are each authorized within their respective regions, or districts to sign and issue: (1) subpoenas requiring any persons to appear and testify or to appear and produce documents, or both, at any designated place; (2) inspection requirements requiring any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodation, to permit the inspection and copying of records and any other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 13th day of May 1944.

FILE COPY



No. 583

In the Supreme Court of the United States

OCTOBER TERM, 1946

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMIN-
ISTRATOR, PETITIONER

v.

MOHAWK WRECKING AND LUMBER CO., A PARTNER-
SHIP, AND HARRY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE TEMPORARY CONTROLS ADMINISTRATOR
IN OPPOSITION TO THE MOTION TO VACATE THE SUB-
STITUTION OF PHILIP B. FLEMING FOR PAUL A. PORTER
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STATEMENT

On December 16, 1946, on motion of the Acting Solicitor General this Court ordered that Philip B. Fleming, Temporary Controls Administrator, be substituted in the above-entitled proceeding in place of Paul A. Porter, Administrator of the Office of Price Administration, resigned. The motion read: "The Solicitor General suggests to the Court the resignation of the Honorable Paul A. Porter, as Administrator, Office of Price

Administration, effective December 12, 1946, and moves that his successor, Philip B. Fleming, Temporary Controls Administrator, who assumed office December 12, 1946, be substituted as Petitioner in the above case."

After the Order granting substitution was entered, respondents filed a motion to vacate it, and the Administrator filed a memorandum opposing the motion. On January 6, 1947, this Court ordered that further consideration of the motion be deferred to the hearing on the merits. Respondents filed a brief in support of the motion on March 3, 1947, and the present brief is filed in response thereto.

SUMMARY OF GOVERNMENT'S POSITION

It is the Government's position that sufficient authority to create the Office of Temporary Controls in the Office for Emergency Management in the Executive Office of the President, and to transfer the functions of the Administrator of the Office of Price Administration to the Temporary Controls Administrator is found in the First War Powers Act (55 Stat. 838, 50 U. S. C. App., Supp. V, 601 et seq.), and in the Emergency Price Control Act of 1942, as amended, (56 Stat. 23, 50 U. S. C. App., Supp. V, 901, et seq.). The underlying question is whether Congress in this legislation intended to grant the President power to accomplish the transfer and consolidation of the Office of Price Administration and its functions effected in Executive Order 9809. The inten-

tion to do so has been shown in several ways, including Congressional acceptance of similar Presidential action in the past, and the recent passage of appropriation legislation in the course of which the Office of Temporary Controls is treated as the lawful repository of the functions of the Office of Price Administration and General Fleming is treated as the lawfully appointed successor to the functions of the Price Administrator.

The respondents' argument that Congress relied on the Administrator's personal discretion and judgment in the exercise of the functions set forth in the Emergency Price Control Act ignores the following facts: (1) the Administrator's settled practice of delegating important functions to others whose names were not submitted to the Senate has been almost unanimously approved by the courts;¹ (2) the authority given to the President by Section 1 of the First War Powers Act is a sweeping authority to make "such redistribution of functions * * * as he may deem necessary"; (3) Congress has impliedly ratified the President's consistent construction of this Act as authorizing transfers and consolidations where

¹ Function of instituting law-suits; *Bowles v. Wheeler*, 152 F. 2d 34 (C. C. A. 9), certiorari denied, 326 U. S. 775. Function of issuing maximum rent regulations; *Bowles v. Griffen*, 151 F. 2d 458 (C. C. A. 5). Respondent's argument as to non-delegability is based on just one of six circuit court of appeals decisions, the other five of which (See Government's main brief herein, p. 15) have held that the Administrator may delegate the power to sign and issue subpoenas.

the transferred functions and offices were created subsequent to the passage of the Act, and also where the transfer was from a Senate-confirmed to a non-confirmed officer; (4) the President's powers under the First War Powers Act do not terminate until six months after the termination of the war, and the war has not been terminated; (5) the transfer was authorized under the provisions of Section 201 (b) of the Emergency Price Control Act since the Office of Economic Stabilization (with which the Office of Price Administration was consolidated) and the Office for Emergency Management in the Executive Office of the President (within which the Office of Temporary Controls was placed) had functions with respect to commodities controlled by the Office of Price Administration; (6) Section 1A (c) (2) of the Price Control Extension Act in no way purports to amend or repeal the authority granted in Section 201 (b) of the Emergency Price Control Act or in the First War Powers Act; (7) the authority granted in these two statutes is consistent with the Constitutional provision that Congress may vest the appointment of inferior officers in the President alone; and (8) the very recent Congressional proceedings show an acceptance by Congress of the transfer effected by Executive Order 9809. Respondents further err in relying on the provisions of the Act of February 13, 1925, 43 Stat. 936 (28 U. S. C., Supp. V, 780) as to sub-

stitution, since the requirements of that statute have been satisfied.

ARGUMENT

I. The President had authority to transfer the functions of the Price Administrator to the Temporary Controls Administrator

A. The First War Powers Act authorized the creation of an agency such as the Office of Temporary Controls to receive transferred functions

The First War Powers Act is an emergency measure designed to give the Executive the broadest authority to transfer government functions and reorganize government agencies. The powers granted the President expire six months after termination of the war and at such time, the transferred functions and powers revert to their original source. The crux of the Act is found in Section 1, *infra*, pp. 37-38, which provides that:

* * * the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, * * *

Although the quoted language does not specifically state that the President may create a new agency which will consolidate the functions and powers previously exercised by one or more other agencies, the statute has always been construed by the executive department to confer such authority. For example, under its provisions, the National Housing Agency was created on February 24, 1942, by Executive Order 9070 (7 F. R. 1529), consolidating the functions of the Federal Housing Administrator, the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Company, etc.; the War Food Administration² was created on April 19, 1943, to include the former functions of the Farm Credit Administration, Food Production and Distribution Administration, Commodity Credit Corporation, etc.; the Office of War Mobilization was created with new powers and functions in May, 1943, by Executive Order 9347 (8 F. R. 7207); the Office of Economic Warfare on July 15, 1943, by Executive Order 9361 (8 F. R. 9861); the Surplus War Property Administration on February 19, 1944, by Executive Order 9425 (9 F. R. 2071); the Foreign Economic Administration, on September 25, 1943, by Executive Order 9380 (8 F. R. 13081). These are but some of the transfers of powers and functions and consolidations in which new offices, agen-

² See E. O. 9334 (8 F. R. 5423), amending E. O. 9322 (8 F. R. 3807). See also E. O. 9392 (8 F. R. 14783).

cies and bureaus have been created by the President under this provision. Such contemporaneous and consistent construction by the Executive to whom the power was granted is entitled to great weight. *Billings v. Truesdell*, 321 U. S. 542, 552-53; *United States v. Jackson*, 280 U. S. 183, 193; *United States v. Midwest Oil Co.*, 236 U. S. 459; *Surgett v. Lapice*, 8 How. U. S. 48.

Furthermore, Congress has appropriated funds³ for the use of these agencies, thus indicating its acquiescence in such Executive construction of the Act. *Brooks v. Dewar*, 313 U. S. 354; *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139; *Wells v. Nickles*, 104 U. S. 444, 447.

The legislative history of the Reorganization Act of 1945 (59 Stat. 613)⁴ confirms the position outlined above. After extensive consideration of the President's use of the powers granted in the First War Powers Act, it was decided not to

³ For appropriations for the War Production Board, see Act of July 25, 1942, 56 Stat. 704, 709; Act of July 12, 1943, 57 Stat. 522, 532-533; Act of June 28, 1944, 58 Stat. 533, 541-542. For the Board of Economic Warfare, see Act of October 26, 1942, 56 Stat. 990, 996; Act of July 12, 1943, 57 Stat. 522, 523. For the War Food Administration, see Act of May 5, 1945, 59 Stat. 136, 152-153, which refers specifically to the duties transferred to the Administrator by E. O. 9322 and other similar executive orders.

⁴ "It is settled that subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 277.

amend or repeal that Act by the Reorganization Act of 1945, and this decision was made after Congress had shown an awareness that new agencies had been created by executive order.⁵ This knowledge on the part of Congress, added to the history previously indicated, makes it reasonable to apply the principle that when Congress knows of the construction placed by the Executive on an Act and fails to amend it, as was the case here, it may normally be assumed that the Act has been rightly construed. *United States v. Jackson*, 280 U. S.

⁵ Representative Whittington, who was in charge of the original bill during the debate in the House on the measure, in response to a question as to the effect of the Act on the President's war powers, stated that:

"* * * when this bill was introduced by our distinguished chairman, when a similar bill was introduced in the Senate, there was a provision to repeal in whole or in part in one or both of those bills the First War Powers Act. This committee took the position that that is a big question. It was being considered by this Committee on the Judiciary if not by other committees of the House. The Committee on the Judiciary reported the first war powers bill. We studied the question. We went into it. The war powers conferred upon the President expire 6 months after the war automatically. We ran into the difficulty that before we know it if we undertake in this present bill dealing with reorganization to also provide for modification, repeal, or amendment of the War Powers Act, we might authorize the continuance of some agencies that Congress had not heretofore provided for. The bill does not amend or repeal the First War Powers Act." (91 Cong. Rec. 9356.)

See also, 91 Cong. Rec. 9354, where the same speaker stated:

"There are about 58 in all. All of these independent agencies are either established directly by an act of Congress or

183, 196-197; *United States v. Midwest Oil Co.*, 236 U. S. 459, 472, 473; *Brooks v. Dewar*, 313 U. S. 354, 361.

Indeed, it may reasonably be argued that no "new" agency has been created at all, since the Office of Temporary Controls is merely a subdivision of the Office for Emergency Management of the Executive Office of the President—an office which was, of course, existing at the time of the enactment of the First War Powers Act.

Respondents argue also that the proviso in Section 1 of the First War Powers Act, *infra*, pp. 37-38, that the authority there conferred "shall be exercised only in matters relating to the conduct of the present war" limits the exercise of that authority to a period of actual hostilities. However, Presidential Proclamation 2714, *infra*, pp. 43-44, which declared the end of hostilities (but also reaffirmed the continuation of a "state of war") was not issued until December 31, 1946, whereas Executive Order 9809, *infra*, pp. 44-49, was issued on December 12, 1946, and respondents do not attempt, nor could they, in the face of the plain lan-

they are established by the Chief Executive under power we have conferred upon him."

The report of the House Committee on Expenditures in the Executive Departments (H. Rep. 971, 79th Cong., 1st Sess.) also indicates extensive consideration of the First War Powers Act in relation to the differences between exercise of executive power under that Act and the one reported out by the Committee.

guage of Sections 5 and 401 of the Act* properly argue that the end of hostilities in itself caused a reversion of powers exercised under the Act. Nothing in the debate on the First War Powers Act quoted by respondents (Brief, pp. 15-17) impairs this view or supports their contention that the end of hostilities terminated the powers conferred on the President by the Act. There is no reference at all therein to hostilities; in fact, Representative Hancock referred to "when the war and emergency passes," as the time for reversion of powers conferred by the Act. He further stated:

"* * * the very last paragraph of the last title provides that titles I and II of this bill shall remain in force during the continuation of the present war and for 6 months after the termination of the war, or until such earlier date—we were rather careful to insert this safeguard—as Congress by a concurrent resolution or the President may designate."

* Section 5 provides: "Upon the termination of this title all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding."

Section 401 provides: "Titles I and II of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President may designate."

It is therefore clear that even if "hostilities" is given the identical meaning as "war," the powers conferred by the Act would continue to exist for six months after December 31, 1946, the date on which hostilities ceased.

In any event, the terms "termination of the war" and "cessation of hostilities" do not have identical meanings. Both Congress and the courts have treated them differently. For example, many war-time statutes were expressly limited in duration until six months "after the termination of hostilities in the present war, as proclaimed by the President, * * *," or during the "time of actual or threatened hostilities"; whereas other legislation passed in the same period was made effective until " * * * six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate." This difference

⁷ See, e. g., Section 3 of the War Disputes Act (57 Stat. 163, 164, 50 U. S. C. App. 1501, et seq.) commonly known as the Smith-Connally Act. For a complete listing of such statutes quoting the pertinent language, see the *New York Times* for January 1, 1947, page 22, where the list of statutes affected by Proclamation 2714 (12 F. R. 1) declaring " * * * that hostilities have terminated," are set out.

⁸ See, e. g., the National Defense Act, Section 47a (41 Stat. 778, 10 U. S. C. 441) providing for R. O. T. C. training. See also *New York Times*, *supra*.

⁹ Act of June 5, 1942, Sec. 16, 56 Stat. 314, 317 (50 U. S. C. App., Supp. V, 776; Act of June 25, 1942, 56 Stat. 390, 391 (50 U. S. C. App., Supp. V, 785); Soldiers' and Sailors' Civil Relief Act, Sec. 604, 54 Stat. 1178, 1191 (50 U. S. C. App. 584); First War Powers Act, *supra*.

in phraseology is significant, particularly since the use of the phrase "hostilities in the present war" indicates that a lesser period is being included in a greater.

So, too, the courts have recognized this distinction and have upheld legislation based on the war power after the termination of hostilities. See, e.g., *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146. There the President had approved the War-time Prohibition Act, on November 21, 1918, after the armistice, and the plaintiff in that case, on October 10, 1919, brought suit to enjoin the enforcement of the Act contending that it had become void because the war emergency had passed. The Court assumed for the purposes of the argument that the existence of a technical state of war did not support the exercise of the war powers. It then held that the cessation of hostilities did not end the war power, but that that power included the power "to remedy the evils which have arisen from its rise and progress" (p. 161), and continued for the duration of the emergency. Concluding, for reasons set forth below,¹⁰ that the emergency still

¹⁰ See 251 U. S. 146, 162. The reasons advanced by the Court included the fact that peace treaties had not yet been concluded (which is equally true today); that other war activities had not yet been brought to a close (we are still maintaining armies of occupation in enemy countries); that railways were still under national control; that manpower had not yet been restored to a peace footing (today we still have an army three times its prewar size, and a draft law was in full effect when the Executive Order here involved was issued).

existed, the Court held the Act valid, even though hostilities had long ceased. See also *Porter v. Granite State Packing Co.*, 155 F. 2d 786 (C. C. A. 1); *Stewart v. Kahn*, 11 Wall. 493; *Brown v. Wright*, 137 F. 2d 484 (C. C. A. 4); *Porter v. Timmons*, 158 F. 2d 370 (C. C. A. 4).

B. The powers created in the First War Powers Act apply to, and are unimpaired by, subsequent legislation, including the Emergency Price Control Act

If there were any doubt of the prospective application of Title I of the First War Powers Act to subsequently created agencies or departments, it has been removed by numerous Congressional acts indicating the legislative intent that transfers of functions created since its enactment could be made under its authority. The first of such acts is the Emergency Price Control Act of 1942. Section 201 (b) of that Act, *infra*, pp. 40-41, in broad terms authorizes the President to transfer to the Office of Price Administration powers and functions relating to priorities and rationing, and from the Office of Price Administration, its powers and functions with respect to a particular commodity or commodities. The provision contains this significant reservation, however:

* * * but, notwithstanding any provision of this or *any other law*, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or

to the Administrator * * *. [Italics added.]

While there is no explicit reference here to the First War Powers Act, references to that Act during consideration of this provision,¹¹ and the fact that it was the only statute then in effect which provided generally for agency transfers,¹² indicates that the legislators had in mind the First War Powers Act.

The whole subject was exhaustively treated by the Emergency Court of Appeals in *California Lima Bean Growers Association v. Bowles*, 150 F. 2d 964, 966-967, in which it was squarely held "that a natural and unrestrained reading of the language just quoted [Sec. 1 of the First War Powers Act] requires the conclusion that the power conferred upon the President to transfer functions from one to another executive agency was intended to extend to any and all functions whether existing before or after passage of the First War Powers Act." See also, *Shrier v. United States*, 149 F. 2d 606 (C. C. A. 6), certiorari denied, 326 U. S. 728.

¹¹See footnote 13. While there are some expressions contrary to those shown in footnote 13 in the Senate debates (87 Cong. Rec. 9846) they are more than balanced by the indicated subsequent legislative history, and the practical and contemporaneous construction given by the House, in appropriations legislation, and acceded to by the Senate. See footnote 3, *supra*, p. 7.

¹²The legislative history of the First War Powers Act indicates that consideration was given to the fact that the President's authority under the Reorganization Act of 1939 had expired. 87 Cong. Rec. 9842.

Nor could it be contended that Section 201 (b) of the Emergency Price Control Act, *infra*, pp. 40-41, being a later statutory enactment, is a *pro tanto* repeal of the First War Powers Act, so that insofar as the transfer of functions of the Office of Price Administration is concerned, the First War Powers Act is not available as a source of authority. It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States v. Borden Co.*, 308 U. S. 188, 193; *Sutherland on Statutory Construction*, 3rd Ed., Vol. I, Sec. 2012. Moreover, the legislative history of the Emergency Price Control Act would indicate that the provisions of the First War Powers Act were regarded by Congress as not being repealed or in any way restricted by the bill which later became the Emergency Price Control Act.¹³ In addition,

¹³ The following appears in the Senate debates on January 9, 1942:

"MR. BONE. * * * I should like to suggest one thing that has come to my attention recently in respect to the proposal before us. Recently Congress passed a law authorizing the President to exercise powers which he heretofore had been denied the right to exercise. He is authorized now by existing legislation to turn over the functions of any department to any other department. That is a blanket, sweeping grant of legislative power given to the President, which is without any limit whatever. It is not repealed, either directly or by implication, in this measure, and it would therefore remain law."

Senator Brown, who was in charge of the bill, confirmed the interpretation placed on the provision by Senator Bone.

the fact that the Price Control Act in Section 1 (b)¹⁴ provided for continued enforcement activities even after expiration of the Act, but nowhere provided specifically for the agency which was to conduct such activities, suggests that Congress contemplated such provision would be made pursuant to the President's authority under the First War Powers Act.¹⁵ Indeed, the President acted on this assumption when upon the suspension of the Price Control Act on June 30, 1946, he effected in Executive Order 9745 (11 F. R. 7327²) under authority of the First War Powers Act, the continuation of the Office of Price Administration for the purpose, among others, of carrying out the

He also pointed out that although power previously granted to the President in the "Van Nuys Act" (First War Powers Act) was not affected, the addition of Section 201 (b) had been suggested by Senator Taft who felt that "if the President found it would be wise to transfer the control over any *particular commodity* to an agency specially equipped, the President unquestionably would have the authority to do so." 88 Cong. Rec. 176-177. [Italics added.] See Point D, *infra*, pp. 22-26.

¹⁴ Sec. 1 (b) provides in part: "that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

¹⁵ It was not until the Price Control Extension Act of 1946, effective July 25, 1946, that Congress decided (in subparagraph (c) (2) of Section 1A of that Act) to reserve to itself the right to designate what agencies should exercise the functions of the Office of Price Administration after that agency expires.

enforcement functions surviving by virtue of Section 1 (b) of the Act.

Even if Section 201 (b) could be properly construed to restrict the President's authority under the First War Powers Act, it may be that the reference in Section 201 (b) to the transfer of functions "with respect to a particular commodity or commodities" would have no application at all to a transfer of enforcement functions. (Cf. *Bowles v. American Brewery*, 146 F. 2d 842, 847 (C. C. A. 4). We shall argue later herein that the authority in Section 201 (b) should not be read so narrowly (see Point D, *infra*, pp. 22-26). If, however, the Court adopts this narrow construction and decides that Section 201 (b) has no reference to the transfer of enforcement functions, that would constitute additional support for our present point that the authority under the First War Powers Act to transfer enforcement functions is unrestricted by Section 201 (b) of the Price Control Act.

Finally, even if the authority for a transfer of functions under the First War Powers Act was superseded or restricted by Section 201 (b) of the Price Control Act, the authority granted under Section 201 (b) itself is ample to sustain Executive Order 9809. This point is developed below under Point D, *infra*, pp. 23-24.

Nor is there any merit in respondents' contention that Section 1A (c) (2), *infra*, p. 40,

of the Emergency Price Control Act, added by the Price Control Extension Act of 1946, directing the President to recommend to Congress by April 1, 1947, the established departments or agencies to be charged with administering price controls "after June 30, 1947," indicates that Congress had reserved to itself the power to determine the recipient of the Price Administrator's functions. By its very terms, the Extension Act is obviously inapplicable to a transfer such as the present one which takes place *before* June 30, 1947. If Congress had intended to limit the President's powers while the Emergency Price Control Act was in full force and effect prior to June 30, 1947, it would have repealed or amended Section 201 (b). The mere fact that this section was retained intact, conclusively disposes of respondents' contentions.

C. The First War Powers Act authorizes the transfer of functions from a Senate-confirmed to a non-Senate-confirmed official

Respondents do not point to any restrictive language in the First War Powers Act which prohibits the transfer from an agency whose administrator has been confirmed by the Senate, to an agency whose head has not been so confirmed. Any such contention is barred by the breadth¹⁶ of the language of Section 1, previously set forth.

¹⁶ Also see footnote 13, *supra*, showing that in the Senate debate on the bill which became the Emergency Price Control Act, the First War Powers Act was described as granting the President unusual emergency powers.

But there is also a provision of Section 2 of that Act which authorized the transfer to an agency headed by Philip B. Fleming even though it might not have been authorized if the agency had been headed by some other person. Section 2 provides:

* * * In carrying out the purposes of this title the President is authorized to *utilize, coordinate, or consolidate* any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or *officers now existing by law*, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. [Italics supplied.]

It would be absurd to construe this authority to "utilize * * * officers now existing by law" as requiring such officers as were previously confirmed by the Senate to be resubmitted in connection with the receipt of the new functions. Such construction would, in effect, require congressional action for each intended transfer of functions, a result at cross purposes with the broad grant of power intended by Congress to be vested in the President. In effecting the transfer here under consideration, the President did *utilize an officer then existing by law*, for Philip B. Fleming, the Temporary Controls Administrator, had been appointed Federal Works Administrator.

(an office which he still retains), and had been confirmed as such Administrator by the Senate on December 4, 1941 (87 Cong. Rec. 9413), fourteen days prior to enactment of the First War Powers Act.

Moreover, even if the Temporary Controls Administrator had, in fact, not been an officer at the time of enactment of the First War Powers Act, the consistent executive construction of the Act supports the conclusion that he could lawfully receive a transfer of the functions of the Price Administrator. The President has, without submission for Senate confirmation, appointed the administrative heads of agencies created under the Act,¹⁷ and the Congress, which could not have

¹⁷ See, E. O. 9024 (7 F. R. 329) creating the War Production Board, whose chairman, appointed by the President without Senate confirmation, received transfers of functions and powers from the Secretaries of the War and Navy Departments. See also, E. O. 9490 (9 F. R. 12707).

E. O. 9425 (9 F. R. 2071) established the Surplus War Property Administration with a blanket provision that "all functions, powers, and duties relating to the transfer or disposition of surplus war property, heretofore conferred by law on any Government agency may, to the extent necessary to carry out the provisions of this order, be exercised also by the Administration," to be appointed by the Director of War Mobilization.

E. O. 9334 (8 F. R. 5423) created the War Food Administration with an Administrator "appointed by the President and . . . directly responsible to him." The order further provided that the Administrator could exercise statutory functions conferred upon the Secretary of Agriculture.

E. O. 9361 (8 F. R. 9861) established the Office of Economic Warfare, the head of which was a Director appointed by the

been altogether unaware of this construction,¹⁸ has indicated its approval by appropriating funds for the use of such agencies and the payment of their employees and officials.¹⁹ Such construction of the Act is entirely consistent with Article II, Section 2, Clause 2 of the Constitution, which provides that " * * * The Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone * * * " ²⁰

President, who was given authority to exercise some of the * * * functions, powers and duties * * * of the Secretary of Commerce with respect to * * * certain RFC chartered corporations and the Export-Import Bank of Washington.

¹⁸ In the debates on the Reorganization Act of 1945, the following remarks were made by Congressman Whittington, who was in charge of the bill: " * * * There are many reorganizations under the First War Powers Act. I will give you an illustration that has impressed me, the Department of Labor. There was one reorganization Executive order after the other and while I have not conferred with him, I give it to you as my judgment from my study and general observation that the present Secretary of Labor was really shorn of any substantial power to solve the great labor problems in the country." (91 Cong. Rec. 9354.)

For example, see E. O. 9139 (7 F. R. 2919) establishing the War Manpower Commission (whose Chairman was not submitted for Senate confirmation) and transferring many functions of the Department of Labor to such Commission. See also E. O. 9247 (7 F. R. 7379).

¹⁹ See footnote 3, p. 7.

²⁰ Indeed, the President's action might independently be sustained if this Court were to treat the appointment as a recess appointment under Art. II, Sec. 2, Cl. 3, i. e., under the President's power to fill vacancies "during the Recess of the Senate: by granting Commissions which shall expire at the end of their next Session."

See also *California-Lima Bean Growers Association v. Bowles*, *supra*, wherein the court sustained a transfer of power, pursuant to authority conferred by the First War Powers Act, from the Secretary of Agriculture, a Senate-confirmed officer, to the War Food Administrator, a non-confirmed officer.

D. Even if the transfer is invalid under the provisions of the First War Powers Act alone, it can be sustained under Section 201 (b) of the Emergency Price Control Act

Assuming, *arguendo*, that the President lacked authority under the First War Powers Act to effect a transfer of the functions of the Price Administrator to the Temporary Controls Administrator, such transfer can be sustained under the provisions of Section 201 (b) of the Emergency Price Control Act of 1942. The section provides in part:

The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities, but notwith-

standing any provision of *this* or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred. [Italics supplied.]

The italicized language clearly demonstrates that the section is not a mere restriction, but *confers a power* upon the President to effect a transfer in accordance with its provisions. The comments of its sponsor, Senator Taft, who stated that it was designed to permit the President, if he saw fit, to realign the war emergency program from a horizontal structure (e. g., Office of Price Administration exercising pricing regulations; War Production Board and its successors, priorities and industrial rationing; Secretary of Agriculture, farm production controls, etc.) to a vertical structure (e. g., Secretary of Agriculture exercising all controls, production, pricing, rationing, enforcement, with respect to milk),²¹ indicate

²¹ Senator Taft stated: "There was much testimony to the effect that rather than divide the powers by giving one man the power to fix prices across the board, giving the next man power to fix priorities across the board, and some other man the power to buy and sell across the board, it would be better

that it was designed to supplement power previously granted in the First War Powers Act.²² It was clear that under the First War Powers Act, the President could, for example, transfer the entire priorities power from one agency to another. Senator Taft, however, was fearful that perhaps that Act would not permit the splintering of a function along commodity lines so as to permit different agencies to exercise part of the pricing or enforcement functions granted by Congress in the Emergency Price Control Act. It was, therefore, to suggest the availability of this type of control structure that the Senator recommended that Section 201 (b) be inserted in the latter Act,

Respondents stress the provision of Section 201 (b) that the transfer of functions with respect to a commodity may be made only to an agency having functions relating to such commodity. But this requirement is satisfied since the Office of Economic Stabilization, simultaneously consolidated with the Office of Price Administration into

to divide by commodity groups. I think perhaps it would be, if we had an over-all board which determined the general policy of fixing prices, but that seems very difficult to obtain. I was prepared to say that it would be all right to go ahead with the set-up in this bill, dividing the powers in this way, but I felt that we should at least give the President the power to divide the powers up the other way if it developed, as we went on, that it would be wise to do that." 88 Cong. Rec. 104-5.

²² See footnote 13, p. 15.

the Office of Temporary Controls, clearly had functions with respect to commodities controlled by the Office of Price Administration.²³ Moreover, the Office of Temporary Controls is specifically placed in the Office for Emergency Management in the Executive Office of the President,²⁴ which has been responsible for the over-all direction of the price control and stabilization program, thus, also, having functions with respect to the commodities concerned.²⁵

Congress was aware of the fact, at the time of enactment of Section 201 (b), that emergency agencies were headed by officers who had not been confirmed by the Senate (e. g., the War Production Board; Office of Civilian Defense; Lend Lease Administration; Office of Defense Transportation). Congress nevertheless did not provide that the recipient of functions transferred under Section 201 (b) must first be submitted for Senate confirmation. Hence, there is reason for asserting that Congress contemplated that, for example,

²³ See, E. O. 9250 (7 F. R. 7871).

²⁴ The Office for Emergency Management in the Executive Office of the President was established pursuant to the Reorganization Act of 1939 (Reorganization Plan I, 5 U. S. C. 133t [note]; E. O. 8248, 4 F. R. 3864; Administrative Order of Jan. 7, 1941, 6 F. R. 192).

²⁵ See, E. O. 9250 (7 F. R. 7871) which established the Office of Economic Stabilization in the Office for Emergency Management under authority contained in the Stabilization Act of 1942, as amended (56 Stat. 765, 50 U. S. C. App., Supp. V, 961-971).

the War Production Board could have received a transfer of the pricing function, e. g., with respect to steel, under Section 201 (b). It was contemplated, in other words, that transfers might be made from Senate-confirmed to non-Senate-confirmed officers.

It is, therefore, clear that the transfer of the Price Administrator's functions to the Temporary Controls Administrator can be sustained under the provisions of the Emergency Price Control Act independently of authority derived from the First War Powers Act.

E. Current Congressional proceedings show Congress' acceptance of the action taken in E. O. 9809

If respondents' contentions had any basis in fact, it would be expected that Congress, whose powers had been allegedly usurped, would in its first contact with the new "unauthorized office" make its objections clearly known. But, on the contrary, Congress has acted in a manner indicating approval of Executive Order 9809. The Temporary Controls Administrator, Philip B. Fleming, was summoned by the House and Senate Committees on Appropriations to testify in their hearings on the Presidential request for a deficiency appropriation for the Office of Temporary Controls, and after the Administrator fully explained the nature of the consolidation of the various war agencies by Executive Order 9809 there was no expression de-

nying its validity or contesting General Fleming's status by the Committee members.²⁶ Moreover, although the Urgent Deficiency Appropriation Bill reported to and passed by the House rescinded \$9,000,000 of a previous appropriation, it gave no indication that the exercise by the Temporary Controls Administrator of functions authorized under the Emergency Price Control Act was unlawful; indeed, the original House bill specifically referred to the "Office of Price Administration, Office of Temporary Controls" as a unit within the Office for Emergency Management in the Executive Office.

²⁶ See pp. 1-4, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 80th Cong., 1st Sess., on the Urgent Deficiency Appropriation Bill for 1947, H. R. 1968. The pertinent testimony in regard to the structure of the Office of Temporary Controls is as follows:

The CHAIRMAN. We have a recommendation from the President, contained in House Document No. 55, for the rescission of \$1,200,000 from the current appropriation for the Office of Temporary Controls. It is noted that the entire amount will be from the funds available for salaries and expenses of the Civilian Production Administration.

General FLEMING, there was appropriated for the Office of Price Administration \$101,000,000. Your expenditures to the 30th of November 1946 were \$56,971,636. That leaves a balance of \$44,020,000. * * *

General FLEMING. Mr. Chairman, I wonder if I might make a preliminary statement on the whole Office of Temporary Controls and then take up the various constituent units one by one, in order? * * *

General FLEMING. Many members of the Appropriations Committee have become accustomed to my appearances be-

of the President. And the bill as amended and passed by the Senate on March 5, 1947, restored the \$9,000,000 rescinded by the House and appropriates "for carrying out the functions of the Office of Price Administration *transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls*, \$7,991,815, which amount shall be merged with the funds transferred, *pursuant to said Executive order*, from the appropriation 'Salaries and expenses', Office of Price Administration, in the Third Deficiency Appropriation Act, 1946." [Italics supplied.] The bill as amended in conference which was passed by both Houses of Congress and approved by the President on March 22, 1947 (Pub. Law No. 20, 80th Cong.,

fore it in my principal role of Federal Works Administrator. Today, however, I am appearing before this subcommittee for the first time in the additional capacity of Temporary Controls Administrator.

In brief, the Office of Temporary Controls was created by the President by Executive Order 9809 on December 12, 1946, and I was appointed by the President as Temporary Controls Administrator in addition to being Federal Works Administrator and without any additional compensation from the Government. * * *

Today, this committee is making particular inquiry into the status of funds appropriated to each of the constituents of the Office of Temporary Controls with the objective of disclosing any portions of those funds which may be no longer necessary to meet the expense of the continuing temporary programs and the costs of liquidation and thus may be susceptible to immediate rescission * * *

See also pp. 1-12, Hearings before the Committee on Appropriations, Senate, 80th Cong., 1st Sess., on the Urgent Deficiency Appropriation Bill for 1947, H. R. 1968.

1st Sess.) contains substantially the same language (which is set forth below ²⁷) with respect to the transfer. Such treatment of the transfer of functions of the Office of Price Administration to the Office of Temporary Controls and the recognition of the status of the Temporary Controls Administrator by the Congress demonstrates its acceptance or ratification of the President's action in Executive Order 9809. See *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-303; *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139; *Brooks v. Dewar*, 313 U. S. 354.

II. The substitution here effected complies with the statutory provisions governing substitution

Respondents object to the substitution of General Fleming for Mr. Porter on the grounds that the Temporary Controls Administrator is not a successor in office to the Price Administrator within the meaning of Section 11 (a) of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C., Supp. V, 780, *infra*, pp. 42-43, and that there is no substantial need for continuing and maintaining the action in view of the fact that the commodities involved have been exempted from future price ceiling requirements. Both of these contentions are without merit.

²⁷ "Salaries and expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,051,752 to be available for the payment of terminal leave only: * * *

Executive Order 9809 specifically provides that the Temporary Controls Administrator shall be vested with all the functions of the Price Administrator, including the right to institute new and maintain pending actions. He is, therefore, very clearly the successor to the functions of the Price Administrator, if not to his title. There is nothing sacrosanct about the specific title of the office which would alone carry with it all the indices of succession; the material factor is the succession to the powers and duties. In the only reported decision which we have found dealing with this issue, it was held that the substitution provisions apply not only to cases where one individual succeeded another in the same office, but to situations like the present one, where the duties of one office were transferred to another. *United States ex rel, Ordmann v. Cummings* (App. D. C.) 85 F. 2d 273; Cyc. of Fed. Procedure, 2d Ed., Vol. 7, pp. 334-35. Moreover, as indicated previously (See Point E, *supra*, pp. 26-29) Congress has treated the Temporary Controls Administrator as the lawful successor to the Price Administrator.

Respondents further suggest that the Administrator cannot comply with the provisions of Section 11 (a), *supra*, in that he cannot show any "substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved," in view of the "repeal" of the price control program. However,

respondents have mistaken the purpose of this provision, which is derived from the original Act of February 8, 1899, 30 Stat. 822.²⁸ The legislative history of the Act of 1899 indicates that the requirement of a showing of substantial need for continuing the action was not intended to apply to a case such as the present one where a public official seeks to continue a suit on behalf of the United States where such suit was started by a predecessor in office. Its purpose was, where suit had been started against a predecessor in office, to give the successor an opportunity to perform in accord with the gravamen of the citizen's complaint and thereby *prevent the survival* of the action against him.²⁹ Therefore, the statute

²⁸ In enacting Section 11 (a) some minor revisions of the Act of 1899 were made in the language of the first paragraph (e. g., "showing a necessity for the survival thereof to obtain a settlement of the questions involved," was changed to "satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved"), and a new paragraph was added to provide for substitution of state, county, and city officials. The only reference to the section made in the report which accompanied the bill is to the added new paragraph, stating that "State, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice" (House Report 1075, 68th Cong., 2d Sess., p. 7). The absence of any reference to the slight verbal differences in the first paragraph is persuasive that a change in the character of the showing to obtain substitution was not intended.

²⁹ Representative Connolly, who was in charge of the bill, explained its purpose as follows: "The plaintiff may file a petition showing the necessity for the continuance of the

should not be construed as requiring the Administrator, when suing for the benefit of the United States, to make a showing of substantial need for maintaining the action and obtaining an adjudication of the litigated issues.

action to obtain a settlement of the questions involved. It does not seek absolutely to impose the costs that have accrued upon the new defendant, but leaves that to the discretion of the court. So that with this law it would be found when this new official comes in while a suit of that kind [suit for relief from action of a public official where the official dies while the case is on appeal] is pending before the court as against his predecessor, the new official will have to carry out the law; and if he carries it out within the purpose of the suit pending in the case there is no further necessity for prosecuting it.

"If, however, he declines to comply with the demands made upon him, then, upon filing petition in the court showing his declination and showing the necessity for a continuance of the suit against him in order to have the action settled, the court is authorized to have the suit survive against him and make whatever order is equitable. The gentleman concedes that the law is right as far as it goes, but thinks that it might apply in other cases besides mandamus and injunctions, but the committee could conceive of no other case where the suit could be brought by or against an official, in his official capacity, in order to obtain a construction of law." (31 Cong. Rec. 3866.) [Italics added.]

House Report 960 (55th Cong., 2d Sess.) which accompanied the bill is to the same effect: "The proper disposition of costs already accrued in such cases presents some difficulty. A mandamus proceeding against an officer is based upon the claim that he is personally refusing to perform some duty which the law requires of him in his official character, and if decided against him he is properly liable, personally, for all cost of the proceeding, but if he vacates the office before a decision, it might seem harsh to compel his successor to be-

However, conceding *arguendo*, that such a showing is required, the court may take judicial notice of the substantial need for maintaining the present action and obtaining an adjudication of the issues involved. Respondents argue that since all commodities except rice, sugar, and rent are exempt from price control, no purpose of a price-control program is furthered by an investigation of their business activities in the period when controls were in effect. However, assuming, without conceding, that a decision in the present action will not aid any current program,³⁰ Congress has both generally,³¹ and explicitly³² in the Act here involved, stated a policy of equal treatment for accrued liabilities whether or not suit is

come a party to the suit and to the costs already accrued without having been guilty of any personal neglect of the official duty involved in the proceeding; but to provide against this seeming harshness *your committee proposes to amend the bill*" (adding "showing a necessity for the continuance of the action to obtain a settlement of the questions involved") "*so as to give the succeeding official an opportunity to perform the official act involved in the proceeding and thereby prevent the survival of the action against himself, and if he fails to do so, he can not then complain of being mulct in costs accruing against his predecessor.*" [Italics added.] See also footnote 28, p. 31.

³⁰ However, a decision in the present case on the major issue on the merits, whether the Administrator can delegate to subordinates power to issue administrative subpoenas, will aid the current program in rice, sugar, and rent.

³¹ Rev. Stat. 13, as amended, 58 Stat. 118, 1 U. S. C. 29.

³² Sec. 1 (b) of the Emergency Price Control Act.

started prior to the termination date of the Act. Moreover, the Act itself is still in full force and effect, and it is well established that revocation or amendment of a regulation does not affect liabilities incurred prior to such revocation or amendment. *United States v. Hark* 320 U. S. 531; *Utah Junk Co. v. Porter*, 328 U. S. 39, 44; *Collins v. Porter*, 328 U. S. 46. The equal treatment contemplated by Congress cannot be achieved unless the investigatory functions of the Administrator are allowed to continue unimpaired for the duration of the enforcement period.³³

In short, insofar as Section 11 (a) is applicable to the present case, its requirements have been satisfied.

The opinions in *Porter v. Ryan* (U. S. D. C., Ore.), Civil No. 3246, decided by Judge McCulloch on January 8, 1947, and *Porter v. Hirahara* (U. S. D. C., Hawaii) Civil No. 760, decided by Judge McLaughlin on January 29, 1947, denying substitution of General Fleming for Mr. Porter, do not indicate that they have considered the arguments here presented. Both of these de-

³³ It is worth noting that the investigation here contemplated may well have enforcement consequences, since the statute of limitations on such violations as may be uncovered by an examination of defendants' records will not finally bar any possible damage suit until November 10, 1947.

cisions are being appealed by the Temporary Controls Administrator. On the other hand in *Fleming v. Black* (U. S. D. C., E. D. Pa.) Civil No. 5700, Judge Ganey after hearing on objections filed by defendants granted substitution. As a result of this decision substitution was granted in about 160 other cases in the district. Substitution was similarly granted in *Fleming v. Krimm Lumber Co.* (U. S. D. C., W. D. Pa.) Civil No. 1495, on February 15, 1947; in *Fleming v. Donner-Hanna Co.* (U. S. D. C., W. D. N. Y.) Civil No. 1892, on February 14, 1947; *Fleming v. Aaron* (U. S. D. C., W. D. Tenn.) Civil No. 1154, decided on March 12, 1947; *Fleming v. Anderson Motor Co.* (U. S. D. C., Md.) Civil No. 3249, decided on February 28, 1947; *Fleming v. Ell-Carr Co., Inc.* (U. S. D. C., S. D. W. Y.), Civil No. 33-668, decided March 20, 1947; and in *Fleming v. Woodward d/b/a White Satin Dairy and Produce Co.* (Sup. Ct. Oregon) decided on February 18, 1947. In addition a large number of appellate and trial courts throughout the country have granted substitution in cases where no objections have been made.

CONCLUSION

For the reasons stated, the substitution of Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter, Administrator of

the Office of Price Administration should not be vacated.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JOHN R. BENNEY,
Attorney.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement,

DAVID LONDON,
Director, Litigation Division,

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Solicitor, Litigation Division,

JACOB W. ROSENTHAL,
Attorney,
Office of Price Administration,
Office of Temporary Controls.

MARCH 1947.

APPENDIX

1. Pertinent provisions of the First War Powers Act (55 Stat. 838, 50 U. S. C. App., Supp. V, 601 et seq) :

SECTION 1. That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935: *Provided*, That the termination of this title shall not affect any act done or any right or obligation accruing or accrued pursuant to this title and during the time that this title is in force: *Provided further*, That the authority by this title granted shall be exercised only

in matters relating to the conduct of the present war: *Provided further*, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions.

SEC. 2. That in carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.

SEC. 3. That for the purpose of carrying out the provisions of this title, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, governmental corporation, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said functions, except to the extent hereafter authorized by the Congress in appropriation Acts or otherwise.

SEC. 4. That should the President, in redistributing the functions among the executive agencies as provided in this title, conclude that any bureau should be abolished and its duties and functions conferred upon some other department

or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

SEC. 5. That all laws or parts of laws conflicting with the provisions of this title are to the extent of such conflict suspended while this title is in force.

Upon the termination of this title all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding.

* * * * *

SEC. 401. Titles I and II of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President may designate.

Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632; 59 Stat. 306, Public Law 548, 79th Cong., 2d sess., 50 U. S. C. App., Supp. V, 901 et seq.:

SECTION 1. (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not neces-

sary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SEC. 1A. (c) Recommendations by the President to the Congress.—(1) As soon as practicable after the enactment of this section and in any event on or before January 15, 1947, the President shall recommend to the Congress such further legislation as in his judgment is needed to establish monetary, fiscal, and other policies which are adequate to supplement the control of prices and wages during the balance of the fiscal year 1947, and to insure that general control of prices and wages can be terminated by the end of that fiscal year without danger of inflation thereafter.

(2) On or before April 1, 1947, the President shall report to the Congress what, if any, commodities or classes of commodities, including housing accommodations, are in such critically short supply as to necessitate, in his judgment, the continuance of the powers granted by this Act as to them after June 30, 1947, together with his recommendations as to established departments or agencies of the Government (other than the Office of Price Administration) which should be charged with the administration of such powers.

SEC. 201. (b) The principal office of the Ad-

ministrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

Revised Statutes, Section 13, as amended (58 Stat. 118, 1 U. S. C. 29):

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement,

of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Pertinent provisions of Section 11 (a) of the Act of February 13, 1925, to amend the Judicial Code and for other purposes, 43 Stat. 936, 941, 28 U. S. C., Supp. V, 780:

(a) Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

2. Provisions of Proclamation 2714 (12 F. R. 1):

A PROCLAMATION

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the cessa-

tion of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

[s] HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,
The Secretary of State.

Executive Order No. 9809 (11 F. R. 14281) :

PROVIDING FOR THE DISPOSITION OF CERTAIN
WAR AGENCIES

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, section 201 (b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the

Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending).

3. (a) The advisory board provided for in section 102 of the War Mobilization and Reconversion Act of 1944 and its functions, which shall remain vested in such board, are transferred to the Office of Temporary Controls.

(b) The Economic Stabilization Board (transferred to the Office of War Mobiliza-

tion and Reconversion by Executive Order No. 9762 of July 25, 1946) and its functions are terminated.

4. The functions of the Director of War Mobilization and Reconversion under subsections (c) (1), (c) (2), (c) (3), and (c) (4) of section 101 of the War Mobilization and Reconversion Act of 1944 are transferred to the President.

5. The functions of the Director of War Mobilization and Reconversion under the provisions of Executive Order No. 9568 of June 8, 1945 and of Executive Order No. 9604 of August 25, 1945 (with respect to the declassification, release, and publication of certain technical, scientific, and industrial information which has been classified as secret, confidential, or restricted), are transferred to the Secretary of Commerce.

6. The functions of the Director of War Mobilization and Reconversion under the provisions of Executive Order No. 9791 of October 17, 1946 (with respect to the study of scientific research and development activities), are transferred to the Executive Office of the President and shall be administered therein as the President may determine.

7. The functions of the Media Programming Division and the Motion Picture Division of the Office of War Mobilization and Reconversion, and the functions which were transferred from the Bureau of Special Services of the Office of War Information to the Bureau of the Budget by the provisions of paragraph 1 (b) of Executive Order No. 9608 of August 31, 1945, are transferred to the Office of Government Reports, which is re-established as an agency in the Executive Office of the Presi-

dent on the same basis and with the same functions as obtained immediately prior to the promulgation of Executive Order No. 9182 of June 13, 1942. The functions of the Director of War Mobilization and Reconversion with respect to the functions of the said Divisions and the functions of the Director of the Bureau of the Budget with respect to the said functions of the Bureau of the Budget are transferred to the Director of the Office of Government Reports.

8. There are transferred to the Department of the Treasury (a) the functions of the Office of Contract Settlement, (b) the Appeal Board established under section 13 (d) of the Contract Settlement Act of 1944, (c) the Contract Settlement Advisory Board created by section 5 of the said Act, and (d) the functions of such boards, which shall remain vested therein, respectively. The functions of the Director of Contract Settlement, and the functions of the Director of War Mobilization and Reconversion under section 101 (b) of the War Mobilization and Reconversion Act of 1944 with respect to the Office of Contract Settlement, are transferred to the Secretary of the Treasury.

9. The functions of the Financial Reporting Division of the Office of Price Administration, together with the functions of the Price Administrator with respect thereto, are transferred to the Federal Trade Commission.

10. (a) The National Wage Stabilization Board is terminated.

(b) The functions heretofore vested in the National Wage Stabilization Board pursuant to the provisions of section 5 (a)

of the Stabilization Act of 1942, as amended, are transferred to the Department of the Treasury.

(c) The functions under section 5 of the War Labor Disputes Act now vested in the National Wage Stabilization Board shall be administered by a special board or boards to be constituted as may be necessary by the Secretary of Labor from among the members of a panel to be appointed by the President for that purpose.

(d) The tripartite Steel Commission, (created by the National War Labor Board on March 30, 1945) shall continue to carry out its functions within the Department of Labor until such date as the Secretary of Labor may fix for its termination.

(e) All other functions of the National Wage Stabilization Board are transferred to the Secretary of Labor.

11. The authority, records, property, and personnel which relate primarily to the functions redistributed by this order are transferred to the respective agencies in which functions are vested pursuant to the provisions of this order and the funds which relate primarily to such functions are transferred or otherwise made available to such respective agencies: *Provided*, That the Director of the Bureau of the Budget may in any case limit the records, property, personnel, and funds to be so transferred or made available to so much thereof as he deems to be required for the administration of the transferred functions. Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director of the Bureau of the Budget may

direct and by such agencies as he may designate. All personnel transferred under the provisions of this order which the transferee agencies shall respectively find to be in excess of the personnel necessary for the administration of the functions transferred to such agencies by this order shall, if not retransferred under existing law to other positions in the Government, be separated from the service.

12. All prior Executive orders or parts thereof in conflict with this order are amended accordingly. All other prior orders, regulations, rulings, directives, and other actions relating to any function or agency transferred by this order or issued by any such agency shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

13. The provisions of this order shall become effective immediately except that the provisions of paragraph 10 hereof, and those of paragraph 11 to the extent that they relate to the functions referred to in paragraph 10, shall become effective on February 24, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE,
December 12, 1946.

3. Provisions of Supplementary Order 193, as amended (11 F. R. 13464):

PART 1305—ADMINISTRATION

EXEMPTION FROM PRICE CONTROL OF ALL COMMODITIES EXCEPT SUGAR AND RICE

SECTION 1. *Commodities exempt.*—All commodities (including services) are exempt from price control except:

(a) Sugar and sugar solutions derived from sugar cane or sugar beets, including all grades of edible syrups and molasses, and blackstrap molasses (imported and domestic);

(b) Corn syrup and corn sugar (imported and domestic);

(c) Blended syrups (imported and domestic) which contain at least 20% by weight or volume of sugar, sugar solutions, corn syrup or corn sugar, either singly or in combination; and

(d) Rice, rough and milled (imported and domestic).

SEC. 2. *Preservation of records.*—Records shall be preserved as provided by Supplementary Order 189.

SEC. 3. *Stabilization Act of 1942, as amended.*—This order does not affect the notice requirements of section 1 of the Stabilization Act of 1942, as amended, applicable to common carriers and other public utilities.

This Supplementary Order No. 193 shall become effective as of 12:01 a. m. November 10, 1946.

Issued this 12th day of November 1946.

PAUL A. PORTER,
Administrator.

Amendment No. 1 to Supplementary Order 193
(11 F. R. 13637):

ELIMINATION OF CERTAIN REPORTING REQUIREMENTS

Supplementary Order 193 is amended by the addition of a new section reading as follows:

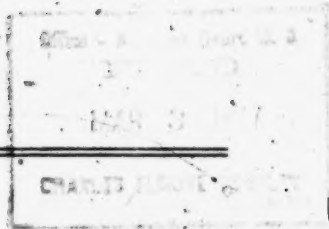
SEC. 4. *Elimination of certain reporting requirements.*—All requirements in any

regulation or orders that a seller or buyer of a commodity or service report to the Office of Price Administration the price he is presently charging or paying for a commodity or service which has been exempted from price control, are hereby revoked.

This amendment is effective immediately.
Issued this 19th day of November 1946.

PAUL A. PORTER;
Administrator.

FILE COPY



**IN THE
SUPREME COURT OF THE UNITED STATES**

~ ~ ~
October Term, 1946

~ ~ ~
No. 583

~ ~ ~
**PHILIP B. FLEMING, Temporary Controls
Administrator, Petitioner**

v.

**MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith**

~ ~ ~
**On Motion of Respondent to Vacate Order of This
Court Permitting Substitution of Temporary
Controls Administrator for Price Ad-
ministrator as Petitioner**

~ ~ ~
**BRIEF FOR RESPONDENT IN SUPPORT OF
MOTION TO VACATE**

~ ~ ~
BROWN, FENLON & BABCOCK,
*Attorneys for Respondent
and Moving Party.*

By: John W. Babcock.

DAVID A. GOLDMAN,
*Of Counsel,
On the Brief.*

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1946

No. 583

**PHILIP B. FLEMING, Temporary Controls
Administrator, Petitioner**

v.

**MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith**

**On Motion of Respondent to Vacate Order of This
Court Permitting Substitution of Temporary
Controls Administrator for Price Ad-
ministrator as Petitioner**

**BRIEF FOR RESPONDENT IN SUPPORT OF
MOTION TO VACATE**

PREVIOUS ACTIONS DESIRED VACATED

On December 16, 1946, the court entered an Order granting a Motion of the Acting Solicitor General of the United States reading as follows:

"The Solicitor General suggests to the court the resignation of The Honorable Paul A. Porter, as Administrator, Office of Price Administration, effective December 12, 1946, and moves that his successor, Philip B. Fleming, Temporary Controls Administrator, who assumed office December 12, 1946, be substituted as Petitioner in the above case."

QUESTIONS PRESENTED

1. Is Philip B. Fleming, Temporary Controls Administrator, the legal successor in authority, powers, functions and office to Paul A. Porter, Price Administrator, Office of Price Administration?
2. On December 12, 1946, was the President of the United States vested with authority and power to consolidate the Office of Price Administrator with any other office or offices and confer upon the Head of the Office of Temporary Controls all of the functions and powers of the Price Administrator with full power and authority to continue and maintain civil proceedings in the courts previously instituted by the Price Administrator?
3. Within and upon the Motion of the Acting Solicitor General, was there a showing of substantial need for continuing and maintaining this action in the name of the Temporary Controls Administrator?

STATUTE AND COURT RULE INVOLVED

STATUTE: Act of February 13, 1925, Section 11, (Title 28, U.S.C.A., Section 780).

COURT RULE: Rule 19, Rules of the Supreme Court, Section 4.

STATEMENT

Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit was granted in the matter upon the application of Paul A. Porter, Price Administrator, Office of Price Administration. While this matter was pending, and on December 12, 1946, Paul A. Porter, by resignation, ceased to hold the office of Administrator, Office of Price Administration, and no other person or official has since been appointed to that office. On December 13, 1946, the Acting Solicitor General of the United States filed the following Motion in this court, to-wit:

"The Solicitor General suggests to the court the resignation of the Honorable Paul A. Porter as Administrator, Office of Price Administration, effective December 12, 1946, and moves that his successor, Philip B. Fleming, Temporary Controls Administrator, who assumed office December 12, 1946, be substituted as Petitioner in the above case."

For reasons unexplainable, respondent did not receive notice of or information about this Motion to substitute, until three days after the Motion, by Order of Court, was granted on December 16, 1946. Respondent promptly filed and noticed a Motion to Vacate said Order of December 16, 1946, and on January 6, 1947, this court ordered:

"Further consideration of the motion to vacate the order of December 16 substituting Fleming for Porter is postponed to the hearing of the case on the merits."

SPECIFICATIONS OF ERRORS

This court erred in granting the Motion for substitution, and substitution of Philip B. Fleming cannot and should not be permitted.

SUMMARY OF ARGUMENT

A. The President of the United States cannot by Executive Order transfer to an officer established by him through Executive Order the functions of an Officer established by Congress and whose appointment must have Congressional confirmation.

B. Philip B. Fleming as Administrator of the Office of Temporary Controls is not the "successor in office" of Paul A. Porter, Administrator of the Office of Price Administration.

C. There is no substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved.

ARGUMENT

A. The President of the United States cannot by Executive Order transfer to an officer established by him through Executive Order the functions of an officer established by Congress and whose appointment must have congressional confirmation.

1. Sources of Authority of Executive Order 9809.

On December 12, 1946, the President, acting "by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, section 201 (b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States" promulgated Executive Order 9809 "for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government." The Executive Order seeks to consolidate into one agency in the Office for Emergency Management in the Executive Office of the President, to be known as the "Office of Temporary Controls" the following: Office of War Mobilization and Reconversion, Office of Price Administration, Office of Economic Stabilization, and the Civilian Production Administration.

The two offices first named were created by Congressional enactment and provided for the administra-

tion of such offices through "Administrators" who were to be "appointed by the President, by and with the advice and consent of the Senate." (Emergency Price Control Act 1942, U.S.C.A., Title 50, War Appendix, Section 921); (Office of War Mobilization and Reconversion, U.S.C.A., Title 50, War Appendix, Section 1651). The two offices last named were created by Executive Orders of the President, under authority claimed vested in the President by the Constitution and Statutes including Title I of the First War Powers Act 1941, and as President of the United States (Executive Order 9638, U.S.C.A., Title 50, War Appendix, Section 601, page 71, Pocket Part; Executive Order 9250, U.S.C.A., Title 50, War Appendix, Section 901, page 314).

Section 201 of the Emergency Price Control Act, 1942, conferred upon the Administrator who "shall be appointed by the President, by and with the advice and consent of the Senate" vast powers to accomplish the avowed purposes of the Act, which were:

(Section 901, Page 313; U.S.C.A. Title 50, War Appendix):

"* * * To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance annuities, and pensions, from undue impairment of their standard of living; to prevent hard-

ships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in price; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3 (section 903 of this Appendix); and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes." * * *

The Congress in subsequently enacting provisions and granting authority to the Office of Price Administration and the Price Administrator to be so appointed, placed great reliance upon the "judgment of the Price Administrator", who, in accordance with the provisions of Section 201 of Title II of the Act was to be an individual appointed by the President, but only by and with the advice and consent of one of the legislative arms of the Congress. Thus Section 2(a) of the Emergency Price Control Act (U.S.C.A., Title 50, Appendix, Section 902(a)) declares:

*"Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act * * *, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act"* (Italics supplied).

The power to make application to an appropriate court is given to the Administrator for an order to enjoin such acts, "whenever in the judgment of the

Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act" * * *, and the power to institute treble damage suits under certain conditions is also conferred upon the Administrator. (See Sections 205 (a) and 205 (e), Emergency Price Control Act, U.S.C.A., War Appendix, Section 925 (a) and 925 (e)). These are non-delegable powers calling for personal judgment of a particular individual. (See *Porter v. Mohawk Wrecking and Lumber Company*, 156 F. (2d) 891; Certiorari granted Nov. 12, 1946; *Cudahy Packing Company v. Holland*, 315 U. S. 357.

Even if power to delegate authority to initiate civil litigation be in the Price Administrator such power is vested in that one official and not in another even though that other be the President of the United States. The cases of *Pinkus and Segal v. Porter*, 155 F. (2d) 90; *Raley v. Porter*, 156 F. (2d) 561; *Porter v. Gantner & Maitern Co.*, 156 F. (2d) 886; *Porter v. Murray*, 156 F. (2d) 781 differ in their conclusions from that of the *Mohawk Wrecking case*, supra, in holding that the subpoena power conferred by the Congress upon the Price Administrator is delegable. But it is emphasized that such power, if it be held properly delegable by the United States Supreme Court, has been conferred upon the Price Administrator and no other Government official.

Having declared that the broad powers and authority conferred upon the Administrator were to be exercised only by an individual appointed by the President "by and with the advice and consent of the Senate", it would appear that only clear and unequi-

vocal language contained in the Constitution or Statutes relied upon by the President, could legally uphold the attempted consolidation in the Office for Emergency Management by Executive Order of the functions of the Office of Price Administration, among other offices created by Congress, to be administered in such manner as the Head thereof may deem desirable, who by appointment of the President only is sought to be invested with the power to perform the functions of the Price Administrator including "the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending)."

An analysis of the authorities cited for the action taken reveals an absence of legal foundation to support the President's action:

(a) *THE CONSTITUTION:*

The general reference to authority vested in the President by the Constitution leaves open to question the specific authority relied upon. There appears to be only two sections of the Constitution touching upon the matter under consideration: Article 2, Section 2, Clause 2, provides:

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court; and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which

shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Article 2, Section 2, Clause 3, provides:

"The President shall have Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

As to the first Clause above quoted, a fair reading of the language would clearly lead to the conclusion that the Congress, having specifically provided the method for the appointment of the Administrator of the Office of Price Administration has made its wishes mandatory upon the President and the Chief Executive Officer is now precluded from following any other manner of appointment.

Hence, where the Constitution of a State declares that a power to act is in the Governor, "by and with the advice of council" or "by and with the advice and consent of the council"; the responsibility rests primarily on the Governor to determine as the Supreme Executive Magistrate whether any action is called for, and what action, if any, is desirable; and the provision for advice of the council is a requirement that their approval and consent shall accompany the affirmative act and enter into it before it becomes complete and effective. In re Opinion of Justices, 190 Mass. 616, 78 N.E. 311, 312.

And where the Governor has authority to appoint members of an Industrial Commission "by and with

the authority" of the Senate, the approval of the senate is just as necessary as the action of the Governor to complete the appointment and give the appointee any right to take over the office and discharge its duties. *McBride v. Osborn*, 59 Ariz. 321, 127 Pac. (2) 134, 136.

Furthermore, the Administrator of the Office of Temporary Controls is not filling a vacancy that happened during the recess of the Senate, but rather has been appointed as the Head of a new office, hence, no reliance can be placed upon Clause 3 of the Constitution quoted above.

(b) *TITLE I—FIRST WAR POWERS ACT, 1941.*

Sections 1 and 2 of Title I of the First War Powers Act, 1941, read as follows:

"§601. COORDINATION OF EXECUTIVE BUREAUS, OFFICES, ETC. BY PRESIDENT FOR NATIONAL DEFENSE AND TO PROSECUTE THE WAR; ISSUANCE OF REGULATIONS.

For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander-in-Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the pur-

poses of this title [sections 601-605 of this Appendix], and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 [sections 301-310, 311-314 of Title 44]: Provided, That the termination of this title [sections 601-605 of this Appendix], shall not affect any act done or any right or obligation accruing or accrued pursuant to this title [sections 601-605 of this Appendix] and during the time that this title [sections 601-605 of this Appendix], is in force; *Provided further, That the authority by this title [sections 601-605 of this Appendix], granted shall be exercised only in matters relating to the conduct of the present war:* Provided further, That no redistribution of functions shall provide for the transfer, consolidation, or abolition of the whole or any part of the General Accounting Office or of all or any part of its functions. Dec. 18, 1941, c. 593, Title I, §, 55 Stat. 838.

“§602. SAME. CONSOLIDATION OF OFFICES; TRANSFER OF DUTIES, PERSONNEL, AND RECORDS.

In carrying out the purposes of this title, [sections 601-605, of this Appendix] the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers *now existing by law*, to transfer any duties or powers from *one existing department, commission, bureau, agency, governmental corporation, office, or officer to another*, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto. Dec. 18, 1941, c. 593, Title I, § 2, 55 Stat. 838” (Italics supplied).

The First War Powers Act was passed December 18, 1941. The language italicized clearly limits the redistribution of functions among executive agencies to those *hitherto by law conferred* upon any executive department, commission, bureau, agency, governmental corporation, office or officer. It is an authorization applicable to "executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers *now existing by law.*" The Congress was thus addressing itself to the condition as it existed at the time of the passage of the Act. The Emergency Price Control Act, 1942, was passed on January 30, 1942. Hence, the functions, powers and authority conferred upon the Price Administrator or the Office of Price Administration are not subject to utilization, coordination or consolidation by the President. The authority of the President to redistribute functions is not unlimited. It was an authority limited to existing departments, commissions, bureaus, agencies, governmental corporations, offices and officers. It was an authority subject to the subsequent enactments of Congress—including the Emergency Price Control Act, 1942—conferring upon an office and an officer, who could be appointed by the President but who could not assume his duties or exercise the prerogatives of the office until his appointment had been considered by and consented to by the Senate of the United States, functions which were not subject to transfer into an office created by Executive Order.

That such was the intent of Congress is seen by reference to Section 4 of Title I of the First War Powers Act (Title 50 War App. Sec. 604) where it is provided that "should the President, in redistributing

the functions among the executive agencies as provided in this Title . . . , conclude that any bureau should be abolished and its or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper." Thus the Congress specifically precluded the President from the action which he has sought to take by means of an Executive Order. The Congress had retained the power unto itself to abolish bureaus and had retained unto itself the power to confer such functions theretofore exercised by the bureau abolished to some other department or bureau.

Moreover, the authority conferred upon the President "to make such redistribution of function among executive agencies as he may deem necessary" is restricted by the later proviso of the act that "the authority by this title granted shall be exercised only in matters relating to the conduct of the present war."¹

¹ This language is taken from the Overman Act which Congress passed at the time of the First World War. As a matter of fact, the First War Powers Act, 1941, is patterned closely after the Overman Act. Title I above referred to finds its counterpart in a similar Title of the Overman Act which reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any function, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall deem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he

It is submitted that regardless of any position that a state of war continue to exist until formal action is taken declaring it an end, when this legislation speaks of "the conduct of the present war", it means, and it was the intention of Congress, that this authority was given only for that period during which actual hostilities were in progress. "To conduct" a war constitutes an affirmative status of hostilities as distinguished from "living" or "existing" during a "state of war" which awaits only a stroke of the pen to formally come to an end.

"Conduct stresses the idea of immediate supervision or personal leadership; as, to *conduct* negotiations, an investigation, a campaign, a prayer meeting."—Webster's New International Dictionary, 2d ed., page 557,

That the Congress was acutely aware of the limiting character of the proviso above referred to is shown by reference to the Congressional Record for December 16, 1941 (Volume 87, No. 225, page 10119) where the following discussion is set forth:

"MR. CASE of South Dakota. I hope that the gentleman in his remarks will explain the last proviso in section 1 of the bill. My reason for making the request is that section 1 of title I,

may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: Provided, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: Provided further, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: Provided further, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war." (40 Stat. Ch. 78, page 556). See also: Cong. Record, Dec. 16, 1941, page 9860.

as I understand it, is practically a reorganization bill in itself, and even gives more powers for the reorganization of Government agencies than was proposed in the so-called Reorganization Act. At that time we had some exceptions in the case of certain specific agencies. This proviso, I believe, takes care of that situation.

"MR. HANCOCK. Mr. Chairman, there are several safeguards on the powers granted by the first title which I shall try to point out as I go along.

"This bill was introduced at the request of the executive department. They feel very strongly that this bill is urgently and promptly needed for the successful prosecution of the war and for the support and maintenance of the Army and Navy. They are asking for the same powers that President Wilson had and used extensively in the last World War. I may point out that those powers were returned to the Congress and to the people when the war was over. It is true it took a change of administration to do it, but history may repeat itself when this crisis is passed.

"As has been pointed out to you, this title is practically reenactment of a bill passed by the Congress and approved by the President on May 20, 1918. It was a war bill, known as the Overman Act. The first title to the present bill is identical with that act except it omits section 3 of the original act which is no longer necessary or desirable. That section set up a special agency to regulate and control the production of aircraft. The provision has been dropped from the present bill.

"There is one other change. Under the original act the rules and regulations of the President for redistributing functions among the executive agencies before becoming effective were obliged to be filed in the offices of the chiefs of the agencies or bureaus affected. Now those orders and

regulations to be effective under the Federal Register Act of 1935 must be deposited with the Archivist before they have the effect of law. The bill is changed accordingly. The gentleman from South Dakota pointed out that at the end of section 1, title I, this language occurs:

'Provided further, That the authority by this title granted shall be exercised only in matters relating to the conduct of the present war.'

"There is a further safeguard to the same effect in the opening line of the first section, which reads that this bill is for the purpose of—

national security and defense, the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy.

"It is provided in section 5 that upon termination of this title all executive or administrative agencies, governmental corporations, departments, and so forth, shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided. In other words, when the war and the emergency passes, the various bureaus and agencies of the Government will return to their normal functions. They will be placed in status quo except as changed hereafter by act of Congress. Further, the very last paragraph of the last title provides that titles I and II of this bill shall remain in force during the continuation of the present war and for 6 months after the termination of the war, or until such earlier date—we were rather careful to insert this safeguard—as Congress by a concurrent resolution or the President may designate.

"So there are four distinct limits on the danger of these vast powers becoming permanent law."

Furthermore, eighteen (18) days after the issuance of Executive Order 9809 creating the Office of Temporary Controls, the President by Proclamation 2714 of January 1, 1947 proclaimed "the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946. Accordingly, there is no reason for seeking to exercise powers under a statute expressly intended to be "for the conduct of the present war."

Indeed, when it is considered that on November 12, 1946 the Office of Price Administration issued Supplementary Order #193 exempting all commodities (including services) from price control, except sugar, molasses, syrups and rice, [see Supplementary Order 193, Fed. Reg. November 14, 1946, page 13464, Vol. 11—No. 222] to attempt to justify the action taken in seeking to redistribute functions to a new Office of Temporary Controls as a matter "relating to the conduct of the present war" appears to be stretching language beyond the breaking point, especially since Executive Order 9809 states "that it is for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government." * * *

(c) *TITLE III—SECOND WAR POWERS ACT.*

Title III of the Second War Powers Act, 1942 is entitled "Priorities Powers" and establishes a system for priority and rationing of material which gives precedence to war contracts. Section 8 of such title declares:

"The President may exercise any power, authority or discretion conferred on him by this sub-

section (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

Since the violation alleged is not that pertaining to a subject covered by the prohibitions of the Second War Powers Act no reliance can be placed upon such Act to support the action sought to be taken by the Hon. Philip W. Fleming in continuing this action.

(d) **SECTION 201 (b)—EMERGENCY PRICE CONTROL ACT 1942.**

Section, 201(b) of the Emergency Price Control Act of 1942, as amended (Section 921, U.S.C.A. Title 50, War Appendix), reads in part as follows:

"The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred."

Section 302(c) of the Emergency Price Control Act of 1942 (Section 942, U.S.C.A. Title 50, War Appendix) defines "commodity" and nowhere in that definition can we find language that will support a theory by which the President might transfer generally the powers and functions granted and conferred upon the administrator by the Emergency Price Control Act of 1942, as amended. On the contrary, the authorization granted to the President to transfer any of the powers and functions conferred by the Act pertains to a particular commodity and was never intended to pertain to the "functions" of the Price Administrator in the sense indicated in Executive Order 9809.

The United States Law Week dated January 14, 1947, 15 L.W. page 2390, reports the case of *Porter v. Ryan*, U.S.D.C., Ore., January 8, 1947, as follows:

"Temporary Controls Administrator may not be substituted for Price Administrator as party-plaintiff in rent control suit in absence of Senate confirmation of his appointment as successor to functions of Office of Price Administration.

"(Text) 'This is a rent case and I am unable to understand how the President can by-pass the Senate under a clause of the Price Control Act which reads: " * * * The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities * * * Sec. 201(b).'"

(e) **SECTION 2—STABILIZATION ACT OF 1942.**

Section 2 of the Stabilization Act of 1942 declares:

"The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 [sections 903 (a), 903 (c), and 942 (c) (1) of this Appendix] to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof. Oct. 2, 1942, c. 578, § 2, 56 Stat. 765." (Title 50, War Appendix, U.S.C.A. Sec. 962).

It is apparent that this section authorizes the President to exercise any power or authority conferred upon him by the Act through such department, agency or officer as he shall direct. Obviously the section does not authorize the President to transfer the powers and functions of the Price Administrator to the new office of Temporary Controls established by Executive Order 9809.

Moreover, the President had already, by Executive Order 9801 of November 9, 1946 (Fed. Reg. November 12, 1946; CCH, War Law Service, Sec. 41, 999.13) terminated all controls theretofore in effect, stabilizing wages and salaries pursuant to the provisions of the Stabilization Act of 1942, as amended, including any Executive Order or regulation issued thereunder "except that as to offenses committed, or rights or liabilities incurred prior to the date hereof, the provi-

sions of such Executive orders and regulations shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense."

"The exception above quoted quite clearly gives no authority to the President to transfer the powers and functions of the Price Administrator to a new agency.

(f) *AS PRESIDENT OF THE UNITED STATES.*

This general language seems to fall under the category of "*descriptio personae*" and simply identifies the individual seeking to consolidate and transfer the functions mentioned. In view of the specific language of the Emergency Price Control Act of 1942 indicating the method and manner of appointment of the individual who was to be intrusted with the vast powers granted by the Congress, it would seem that no authority from this general phrase constituting the legal basis for the transfer of the Price Administrator's functions can be derived.

Furthermore, though we reserve the right, at the proper time, to raise the question of the legality of enactment of the so-called Price Control Extension Act of 1946, we desire to call the courts attention to Section 1A of that purported legislation. Subparagraph (c) (2) of Section 1A provides:

"On or before April 1, 1947, the President shall report to the Congress what, if any, commodities or classes of commodities, including housing accommodations, are in such critically short supply as to necessitate, in his judgment, the continuance of the powers granted by this Act as to them after June 30, 1947, together with his recom-

mendations as to established departments or agencies of the Government (other than the Office of Price Administration) which should be charged with the administration of such powers."

In the light of this language it would appear that Congress had reserved to itself the power to determine whether the powers and functions of the Office of Price Administration should be transferred to other agencies and if so, to what agencies and under what conditions. Congress, it appears, intended that the President report to Congress and that it, the Congress, would then decide whether to adopt the President's recommendation or would determine what established departments or agencies of the Government, if any, should be charged with the future administration of the powers and functions conferred upon the Office of Price Administration by the Emergency Price Control Act of 1942, as amended.

If Congress had intended to authorize the President to transfer the functions of the Price Administrator and the administration of the Office of Price Administration to an entirely new and distinct agency not created by Congress, it is not too much to say that the Price Control Extension Act of 1946, enacted as recent as July 25, 1946 would have contained clear and unequivocal language granting such authority. Not only is the authority not granted but on the contrary Congress specifically required the President to report to the Congress his recommendations as to such transfer so that the Congress could determine what transfers of powers, if any, would be made and to what agency, bureau or department.

B. Philip B. Fleming, as Administrator of the Office of Temporary Controls, is not "the successor in office" of Paul A. Porter, Administrator of the Office of Price Administration.

The petition of Philip B. Fleming praying that he, as Administrator, Office of Temporary Controls, be substituted as plaintiff in the cause in the place and stead of Paul A. Porter Administrator, Office of Price Administration, is predicated upon the provisions of 28 U.S.C.A., Section 780, which reads as follows:

"(a) By or against officer of United States, District of Columbia, Canal Zone, or territory or insular possession of United States; or of county, and so forth of such territory or insular possession: Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharges of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

"(b) By or against officer of State, county, city, and so forth. Similar proceedings may be

had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the Officer's death or separation from the office.

"(c) *Notice of application for substitution of parties.* Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and *accorded an opportunity to present any objection which he may have.* (Feb. 8, 1899, c. 121, 30 Stat. 822; Feb. 13, 1925, c. 229, § 11, 43 Stat. 941.)"

By reference to subsection (a) above quoted it is seen that this cause can only be continued and maintained by or against the "successor in office of such officer", but only when it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause. It appears to be clear that Philip B. Fleming is not the "successor in office" of Paul A. Porter. (See Rule 19, Rules of the Supreme Court, Section 4.) Philip B. Fleming has not been appointed by the President "with the advice and consent of the Senate." Executive Order 9809, by its very terms, creates a new office, Office of Temporary Controls in which the Office of Price Administration, the Office of War Mobilization and Reconversion, the Office of Economic Stabilization and the Civilian Production Administration are consolidated and the functions vested in the Administrator of the Office of Price Administration are sought to be transferred and given to the Administrator, Office of Temporary Controls. A successor is "one who or that which succeeded or takes the place of a predecessor or preceding thing; especially, one who succeeded

to another's rank or property." Funk and Wagnells New Standard Dictionary of the English Language.

"*Successor.* One who succeeds to the rights or place of another; particularly the person or persons who constitute a corporation after the death or removal of those who precede them as corporators."

"One who has been appointed or elected to hold an office after the term of the present incumbent." Black's Law Dictionary, 3rd. Ed., page 1674.

"A successor is one who succeeded or follows; 'a person who has been appointed or elected to some office after another person.'" In re Duncan's Estate, 199 Atlantic, 208, 210, 330 Pa. 241, citing 2 Bouvier Law Dictionary, Rawle's Third Revision, page 3176.

Hence, only a successor in office to Paul A. Porter, Price Administrator, can be substituted as plaintiff in this case. A successor to Paul A. Porter, Price Administrator, could be appointed by the President only "with the advice and consent of the Senate." An appointment of a successor to the Office of Price Administration is effective only upon a confirmation of the appointment by the Senate. To permit the substitution of Philip B. Fleming in this case would constitute a holding that the provisions of the statute requiring confirmation of the Senate may be disregarded by the President of the United States, a position which we believe is completely untenable.

To demonstrate even more clearly that Philip B. Fleming is not the successor in office to Paul A. Porter, resigned Price Administrator, reference is again made to Supplementary Order 193 exempting

all commodities (including services) from price control, except sugar, molasses, syrup and rice (see Supplementary Order 193, Fed. Reg. Nov. 14, 1946, page 13464, Vol. 11, No. 222). The Emergency Price Control Act of 1942, as amended, calls for the exercise of the judgment of the Administrator of the Office of Price Administration to establish by regulation or order maximum prices as in his judgment will be generally fair and equitable when the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purpose of the Price Control Act. If Philip B. Fleming sought to revoke Supplementary Order 193 and to, by regulation or order, establish maximum prices on commodities other than sugar, molasses, syrup and rice, can it be argued that he has the power to do so in view of the fact that he has not been appointed Administrator of the Office of Price Administration; he has not been appointed by the President "with the advice and consent of the Senate." The conclusion seems to be inescapable that Philip B. Fleming is not the successor in office to Paul A. Porter, Price Administrator, Office of Price Administration, that he occupies another and entirely distinct office upon which the President has sought to confer functions of the Price Administrator, an action which we believe we have demonstrated is without legal basis or foundation. Since Philip B. Fleming is not the successor in office, no authority exists for his substitution as party plaintiff in the instant suit. (See United States, ex rel. *Bernardin v. Butterworth*, 100 U. S. 600, holding that in the absence of a Statute permitting the successor in office to be brought into the case by petition or some other appropriate

method, a suit against the Commissioner of Patents to issue a patent abates by the death of the Commissioner.)

C. There is no substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved.

Under 28 U.S.C.A. Section 780 above quoted which was enacted following the *Butterworth* case, it must be "satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." This would appear to mean that the proofs submitted to the court must be sufficient to satisfy reasonable judicial requirements. "Such evidence as is sufficient to produce a belief that a thing is true; credible evidence; such evidence as, in respect to its amount or weight, is adequate or sufficient to justify the court or jury in adopting the conclusion in support of which it is adduced" (Citing cases). *Black's Law Dictionary*, 3d Ed., page 701. As of the date of filing this brief but an infinitesimal portion of the nation's economy is subject to what purports to be price control. The President, by Executive Order 9801 of November 9, 1946 has terminated all controls stabilizing wages and salaries. At the time all controls over wages and prices were lifted with the exception of controls kept over sugar, rice and rent, the President made a statement which is found in Commerce Clearing House, War Law Service, 41371, reading in part as follows:

"The general control over prices and wages is justifiable only so long as it is an effective in-

strument against inflation. I am convinced that the time has come when these controls can serve no useful purpose. I am, indeed, convinced that their further continuance, would do the nation's economy more harm than good. Accordingly, I have directed the immediate abandonment of all control over wages and salaries and all control over prices except that necessary to implement the rationing and allocation programs of sugar and rice. Rent control, however, must and will be continued. * * *

"There is no virtue in control for control's sake. When it becomes apparent that controls are not furthering the purposes of the stabilization laws, but would, on the contrary, tend to defeat these purposes, it becomes the duty of the Government to drop the controls. * * *

"The real basis of our difficulty is the unworkable price control law which the Congress gave us to administer. The plain truth is that, under this inadequate law, price control has lost the popular support needed to make it work. At best, the administration of price control is an extraordinary difficult and complex business and it can work successfully only if the people generally give it their support."

Aside from the bare statement contained in plaintiff's motion for substitution no showing of any kind has been made that there is a substantial need for continuing this cause and securing an adjudication.

In view of the foregoing statements of the President, it is respectfully submitted that there is no substantial need present in continuing and maintaining this cause and by reason of the actions taken by the President and the Price Administrator prior to his resignation, this whole problem has become moot.

CONCLUSION

For the reasons stated in the Motion of the Respondent the Order of this court dated December 16, 1946, permitting the substitution of Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter, Price Administrator, Office of Price Administration, should be vacated and set aside, and the ruling of the court made that said Temporary Controls Administrator cannot legally be substituted in any such litigation.

Respectfully submitted,

**BROWN, FENLON
& BABCOCK,**

*Attorneys for Respondent
and Moving Party.*

By: John W. Babcock.

DAVID A. GOLDMAN,
*Of Counsel,
On the Brief.*

February, 1947.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 583

PHILIP B. FLEMING, Temporary Controls
Administrator, *Petitioner*

v.

MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith

BRIEF FOR RESPONDENT

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**IN THE
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v.

**MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith**

BRIEF FOR RESPONDENT

OPINION BELOW

In this case the Opinion of the District Court (R. 11) is reported at 65 Fed. Supp. 164, and that of the Circuit Court of Appeals for the Sixth Circuit (R. 17) at 156 F. (2d) 891.

JURISDICTION

Appellee does not question the jurisdiction of this court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, but of course, as indicated by its motion separately briefed is questioning the right of Philip B. Fleming, Temporary Controls Administrator, to occupy the position of appellant in this case.

SUMMARY OF ARGUMENT

Decision of the question presented in this case is controlled by the former decision of the Supreme Court in *Cudahy Packing Company v. Holland*, 315 U. S. 357, and the rule announced therein requires affirmance of the judgment of the Circuit Court of Appeals, Sixth Circuit in the case at bar.

The decision of the Supreme Court in the *Cudahy* case was not based upon the legislative history of the Fair Labor Standards Act, but upon the primary reason that the Congressional purpose in this type of legislation is "that the subpoena power shall be delegable only when an authority to delegate is expressly granted", and comment upon legislative history in the opinion in the *Cudahy* case is present only *arguendo* as a supporting reason for the ruling of the court.

All arguments about legislative history, statutory setting, and Administrative Construction, while permissible at times in resolving ambiguities, have no application here since no ambiguities exist and there is no language in the Emergency Price Control Act, as amended, related to administrative subpoenas, distinguishing it from the Fair Labor Standards Act and permitting any difference in construction.

ARGUMENT

Respondent and appellee in the case at bar contends that decision of the sole question before this court is entirely controlled by the former decision of this court in *Cudahy Packing Company v. Holland*, 315 U. S., 357. In deciding this *Cudahy* case, this court, of necessity, gave extended consideration to the Congressional Legislation commonly known as The Fair Labor Standards Act (Title 29, U.S.C.A., Section 201, et seq.), and The Federal Trade Commission Act (Title 15, U.S.C.A., Section 41, et seq.). Admittedly, there are no significant differences in language between the applicable sections of the Fair Labor Standards Act and of the Emergency Price Control Act.

We feel that since the language in this legislation is so alike, a judicial construction of one of the Acts by our Supreme Court must be controlling of interpretation of another of the Acts. Hence, in reliance upon the opinion of the Supreme Court of the United States in *Cudahy Packing Company v. Holland*, supra, we submit that, even though that case arose out of a question of interpretation of the language of the Fair Labor Standards Act, with the language in the Emergency Price Control Act of 1942, as amended, so like that in the Fair Labor Standards Act, the decision on the question of power to delegate authority to sign and issue Administrative subpoenas must be the same.

"All this is persuasive of a Congressional purpose that the subpoena shall be delegable only

when an authority to delegate is expressly granted" (Page 366).

Cudahy v. Holland, supra.

"All this" refers to more than appellant cares to admit. In appellant's argument he would have you believe that the words "all this" refer only to the court's consideration of the legislative history of the one Act, i.e. The Fair Labor Standards Act. Appellant would have you believe that the Supreme Court was pronouncing a rule only applicable to and deduced from consideration of that one Act. Hence, says appellant, since the legislative history of that one Act discloses that Congress expressly considered and expressly rejected a suggestion for delegation of subpoena power, the power of delegation cannot be read into that one Act. However, says appellant, since Congress in considering The Emergency Price Control Act, as amended, did not consider and did not reject (expressly) the delegation of subpoena power, therefore you must read into a general grant of power to the Administration the right to delegate the subpoena power.

But this argument is fallacious because of the words "all this" as used in the opinion of the Supreme Court refers to much more legislation than the Fair Labor Standards Act, and refers to most, if not all, of the legislation enacted by Congress prior to the date of the opinion which included provisions for Administrative subpoena procedure. The court said:

"The entire history of the legislation controlling the use of subpoenas by Administrative Officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power" (Page 364).

This statement in the opinion was followed by enumeration of four other Acts of Congress which contained provisions for the use of Administrative subpoenas. The opinion then concludes that for all legislation of this type the judgment of the court is that the power to delegate authority to issue subpoenas must be "expressly granted" or it does not exist. "Shall be delegable only" cannot be read to mean "except in the case of the Emergency Price Control Act." "Expressly granted" cannot be read to mean that the words of some Senator or group of Senators must limit that full force of this restriction.

The idea that the Supreme Court was adjudicating a positive general rule and not one limited to one Act of Congress is further established by the language of the following sentence, "that purpose has been emphasized here." In other words, the positive general rule that the power must be "expressly granted" is "emphasized" by its particular application to the one Act of Congress. But the court's decision is not limited in application to that one Act of Congress or its legislative history. In all Congressional legislation of this type we must find the authority to delegate "expressly granted" or it is not there. It is not "expressly granted" in the Emergency Price Control Act, and hence, it is not there.

The Supreme Court in the language of the opinion of the majority in the *Cudahy* case was saying to all lower courts, to Congress, to the Members of the Bar of the Nation, and to the public, that in the case of any Act of Congress, language like that found in the Fair Labor Standards Act must be construed in

denial of the power to delegate authority to sign and issue subpoenas.

As an indication that a fundamental rule generally applicable (i.e. that subpoena power not delegable unless expressly granted), was the real purport and consequence of the decision in the *Cudahy* case, and an indication that the decision in this case was not limited merely to an interpretation of legislative history, Justice Douglas in his dissent disposed of the legislative history argument with just three sentences, to-wit:

"The legislative history of this Act does not stand in the way. There is no indication whatsoever that the choice of the House bill as against the Senate bill was in any way influenced by the presence in the latter of an express power of the proposed Board to delegate its subpoena power. The controversy centered on the question as to where administration of the Act should be lodged" (Page 371-372).

The principle burden then of the dissenting opinion, which is sufficiently long to fill six pages of the published reports, is that as a fundamental rule of law the power to delegate must be implied. This principle the majority of the court rejected and, in doing so, adjudicated the opposite principle which must be applied universally: "that the subpoena power shall be delegable only when an authority to delegate is expressly granted." We are bound by this rule of the majority of the court. Since there is no express grant of that authority in the Emergency Price Control Act, the authority must be denied to the Administrator by implication.

It is enough to conclude this discussion by borrowing a paragraph from the opinion of the court below (R. 20):

"The Administrator's contention in the present case that the foregoing rule is not applicable because his authority to delegate the subpoena power is expressly conferred by the provisions of the Emergency Price Control Act set out hereinabove is directly contrary to the ruling of the Supreme Court in the *Cudahy* case that such provisions, practically identical in wording, did not expressly delegate such authority to the Administrator. Accordingly, unless the rule announced in the *Cudahy* case is to be set aside or modified, or unless distinguishing features in this case make it inapplicable, the Price Administrator lacked the claimed authority to delegate the subpoena power to the district director who issued the subpoena herein involved."

However, the labored attempt by petitioner and appellant to contend in his brief that there are distinguishing features in the Emergency Price Control Act which make the rule announced in the *Cudahy* case inapplicable, requires some comment by way of rebuttal. We content ourselves with approaching this discussion under the same headings and in the same order in which they are presented in appellant's brief.

1. Section 201(A) and (B) and Its Legislative History.

Respondent and appellee contend first that legislative history need not be considered at all in the light of the rule of law primarily controlling that in the absence of an express grant of the power of delegation it does not exist. Secondly, however, we also contend that even if the entire legislative history be considered it does not lead to the conclusion advanced by petitioner.

Passing on then, for a moment, to Senate Report No. 931, 77th Congress, 2d Session, to which reference is also made in appellant's brief, we note in that report the following items which appear to indicate an approach somewhat different from that which appellant claims for the one isolated quotation set out in his brief.

Page 6:

"The Committee also considered the alternative of substituting a board of several members for a single Administrator. However, almost every qualified witness who testified before the Senate and House Committees urged centralization of ultimate authority and responsibility in a single individual" (*Italics supplied*).

Page 7:

"This shortened hearing procedure, which has already been developed by other Federal Administrative agencies, is entirely consistent with the preservation of individual rights, and is essential to the administration of an emergency price control statute" (*Italics supplied*).

Page 8:

"The Committee, of course, recognizes that competent administration and enforcement of the Act will be impossible unless the Administrator and persons acting under his direction are given broad investigatory powers. To this end the bill, like most recent legislation, provides authority for obtaining any information, oral or written, which may be of assistance to the Administrator in carrying out his duties" (Italics supplied).

Page 21:

"Section 202(a) (922(a), Title 50, U.S.C.A.) authorizes the Administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced *through the usual forms of compulsory process* and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations" (Italics supplied).

The appellant in quoting in his brief the two sentences from page 20, and the one sentence from page 21 of the same report, apparently argues in substance that the Senate Committee on Banking and Currency was thereby reporting to the Senate an opinion of the Committee that this then new bill, the Emergency Price Control Act, would encourage, favor and authorize (1) decentralization of enforcement and (2) possession of an investigative power peculiar to this bureau and more broad in authority than was and is enjoyed by the Fair Labor Standards Administrator and other Federal Administrative

agencies. Quite contrary to such argument, it appears to us that an examination of the entire context of this report, including the quotations from pages 6, 7, 8 and 21, discloses a congressional purpose and intent that one person would and should have responsibility as well as authority and that, as far as investigative procedure is concerned nothing was being established which was not "already developed by other Federal Administrative agencies," "like most recent legislation," and "the usual forms of compulsory process."

Our conclusion then is that the so-called legislative history of which appellant makes so much does not disclose a congressional purpose and intent to have the Office of Price Administration looked upon by the courts from any perspective different from the other Administrative agencies; does not disclose any ambiguity or uncertainty in the language of the legislation; and does not disclose any consistency, regularity or seeking after confirmation in the matter of reporting to the Congress regarding the policy of the use of Administrative subpoena or other compulsory process.

At the time Congress extended the Emergency Price Control Act of 1942 by passing the Stabilization Extension Act of 1944, approved June 30, 1944, and again in 1945 by Joint Resolution approved June 30, 1945, the Supreme Court Decision in *Cudahy v. Holland* was a matter of public record and the extension of the legislative language must be presumed to have been done in the light of the Supreme Court interpretation of that legislative language. Furthermore, in passing the Stabilization Act of 1944, and

in adopting the Joint Resolution of June 30, 1945, Congress incorporated, presumably after consideration, several Amendments to the Emergency Price Control Act of 1942. We feel that it must be said that Congress, though deeming it wise to amend some sections of the original Act, having every opportunity to amend other sections of the original Act, and having in mind that the Supreme Court had announced its interpretation of language identical with Sections 922(b), U.S.C.A. 50, App., by apparently deeming it unnecessary to amend this Section here in question, publicly announced acceptance by the

Congress of the Supreme Court's limitation upon delegation of Administrative Subpoena Power.

2. The Broad Scope and Emergency Character of the Administrator's Responsibilities.

We believe that complete answer to the argument of petitioner and appellee under this heading is stated concisely and completely in the following language of the opinion of the court below (R. 24):

"If such authority is necessary to make the administration and enforcement of the Act successful, Congress can at any time and in short order create such authority. The appellant's contention in this respect is sufficiently answered by the following closing words in the majority opinion in the *Cudahy* case:

'Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to

restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction.' "

3. The Corroborative Inferences to Be Drawn From Other Features of the Act.

Again we believe that complete answer to this argument is stated by the court below (R. 23) more cogently than we could phrase it. Hence, we borrow that court's language as follows:

"It is then contended that if certain functions and duties are delegable under the Act, and no differentiation is made by the Act between different functions and duties, it necessarily follows that all of his functions and duties, including the power to issue subpoenas, are delegable. The answer to that is that the Supreme Court in the *Cudahy* case had before it the same language and the same question and held that the statutory authority to delegate 'his functions and duties under the Act did not include the authority to delegate the subpoena power."

We presume, however, to supplement this reasoning of the court below with some additional comment. Appellant offers subdivision (d), Section 201, U.S.C.A., War Appendix, as one of the sections of the Emergency Price Control Act, wherein may be found power in the Administrator to delegate authority to subpoena. While the language of this

subdivision (d) is not found in the same identical words in the Fair Labor Standards Act, most of its purport is found in subdivision (f) of Section 208 (U.S.C.A. Title 29), in the following language:

"Orders issued under this section * * * shall contain such terms and conditions as The Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof and to safeguard the minimum wage rates established therein."

However, the language of said subdivision (d) in the Emergency Price Control Act does not aid appellants contention because so far as it is cited as measuring the power of the Administrator to delegate authority to subordinates, it means no more than other language found in the earlier subdivisions (a) and (b) of the same section 201 of the Emergency Price Control Act. Subdivision (a) reads in part: "The Administrator may * * * appoint such employees as he deems necessary in order to carry out his functions and duties under this Act etc." Subdivision (b) reads in part: "he or his duly authorized representatives may exercise any or all of his powers in any place." It cannot be said that as far as delegation of power is concerned, the Administrator can do, by regulation or order (subdivision (d)), more than he can do by appointment of an employee (subdivision (a)), or by conferring due authority upon a representative (subdivision (b)). The precise language of Subdivisions (a) and (b) is also part of the Fair Labor Standards Act and was before the Supreme Court in the *Cudahy* case wherein the Supreme Court said the power to delegate must be "expressly granted" and held in

effect that such power was not "expressly granted" by such language as is found in Subdivisions (a) and (b).

4. The Administrative Practice of Delegation, and Its Ratification By Congress.

Respondent and appellee believes this argument to be irrelevant, to be founded upon a false premise and to be completely unsupported in fact.

It is irrelevant because in amending the Emergency Price Control Act for the purpose (among others) of extending the time of its life on June 30, 1944, and on June 30, 1945, Congress then definitely had before it the decision of the Supreme Court in the *Cudahy* case, and with the Supreme Court of the land interpreting identical language, of what moment or weight would be an administrative construction.

It is founded upon a false premise and unsupported in fact because, as pointed out by the court below (R. 22) "the Act was not Administratively construed from the outset to permit such delegation." While it does appear that among the documents in the files of the Office of Price Administration is a memorandum opinion dated March 26, 1942, issued by the Assistant General Counsel for the Administrator, construing the Act to permit the delegation here contended for, it also is uncontradicted that this remained only the private thinking of certain officials in this Agency and that, as far as public procedure was concerned, there was a period of two years, approximately, during which doubt regarding the

authority to delegate the subpoena power caused the Administrator to refrain from its exercise. Again we quote from the opinion of the court below (R. 22):

"Apparently, the Administrator finally took the position on May 13, 1944, when he assumed to exercise that authority, that he would attempt to obtain favorable action upon his contention by litigation rather than by Congressional action, in spite of the obvious delay and expense involved in the litigation that was certain to follow. Such administrative construction of the Act have very little, if any, weight."

But since petitioner and appellant has presented to this court on Pages 20, 21 and 22 of its brief, three paragraphs extracted from the testimony of Mr. Fleming James, Jr., and apparently has attempted to contend that these three paragraphs accurately "summarized" the history of the Administrative Construction of this question, we have felt that the court ought to consider the entire substance and context of Mr. James' testimony and of the questions asked of him and of the Congressional comment made upon the occasion of the Hearing to which reference is made. (Special Committee of the House to Investigate Executive Agencies on June 22, 1944). Accordingly, we have appended to this brief as an Appendix the complete transcript of Mr. James' testimony at that hearing as it related to the discussion of the question at bar. We believe that a better and more accurate statement to make by way of description of Mr. James' testimony before this Committee of Congress would be to say that on the one, single occasion when any branch of Congress had before it in any form the specific question of delegating the subpoena power, the member or members of Congress

to whom the question was presented, rather than approve this claimed Administrative Construction, criticized the Office of Price Administration for adopting, only shortly prior to the date of this hearing, a practice and procedure contrary to the rule announced in the *Cudahy* case, and said, in substance, to the Office of Price Administration, that if the Administrator wished to have the power to delegate his subpoena authority, he had better come to the Congress and ask for it.

We feel obliged to make one further comment relative to the argument of petitioner under this sub-title. On Page 27 of petitioner's brief appears the following language:

"The Congressional Amendments of 1944 included a specific amendment of Section 202 in two particulars only."

We do not wish the court to gather the impression that the items here mentioned in petitioner's brief were the only items about which Congress amended the Emergency Price Control Act during the year 1944. As a matter of fact, we note that in the "Second Deficiency Appropriation Act, 1944," approved June 28, 1944, there is contained the following proviso, to-wit:

"Provided further, That any employee of the Office of Price Administration is authorized and empowered, when designated for the purpose by the head of the agency, to administer or to take from any person an oath, affirmation, or affidavit when such instrument is required in connection with the performance of the functions or activities of said Office."

This proviso is also presented on page 363 of "Title 50, Appendix, Emergency and Post-War Legislation," U.S.C.A., and there identified as §922a. Hence, it is not to be confused with §922(a) found on page 360 of the last named volume.

Prior to the inclusion of this proviso in the Second Deficiency Appropriation Act, the Authority of Office of Price Administration was found in §922(b) reading in part—"The Administrator may administer oaths and affirmations, etc." Thus it would appear that as of June 28, 1944, Congressional opinion, intent and purpose was that special express language was necessary to give to the Administrator power to delegate his authority to "administer oaths and affirmations." Yet, the legislation which Congress was amending was the same sentence in the Emergency Price Control Act of 1942 upon which the Administrator must depend for his subpoena power. And Congress did not then say that the Administrator might designate an employee who would thereby be authorized and empowered to sign and issue subpoenas. The failure of Congress to include the power to delegate subpoena authority in this express power to delegate authority to administer oaths, is both, an affirmative withholding of delegable subpoena authority in 1944, and an expression in 1944 that since 1942, in line with the *Cudahy v. Holland*, supra, decision, the Administrator has not had the power to delegate his subpoena authority.

As appears to the respondent if there ever was a case in which the rule of *stare decisis* should control the decision, this is it. Respondent contends that if the decision in the *Cudahy* case does not compel

affirmance of the judgment of the court below in this case, then indeed must we abandon all we have learned of the rule of *stare decisis* and henceforth approach each problem presented in private offices and in trial courts without benefit of precedent and as a contest of ingenuity and genius in the formation of arguments which attempt to prove that words as used do not have their usual, ordinary meaning.

CONCLUSION

For the reason stated, respondent in this Case No. 583, contends that the judgment of the Circuit Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

BROWN, FENLON
and BABCOCK.

By: John W. Babcock.
Attorneys for Respondent.

February, 1947.

APPENDIX**TESTIMONY OF FLEMING JAMES, JR.,**

**Director of the Litigation Division,
Office of Price Administration**

Before

**House of Representatives Special Com-
mittee To Investigate Executive
Agencies June 22, 1944**

Present: Representatives Smith (Chairman) and Hartley. Aaron L. Ford, General Counsel to the Committee, and Joseph H. Stratton, Assistant Counsel to the Committee.

Mr. Ford: Will you explain briefly to the committee your legal authority for issuing this regulation?

Mr. James: Yes.

May I, before I begin that, convey Mr. Fields apology for not being here. He has just been asked by Mr. Wagner to help prepare something else.

The Chairman: That is all right.

Mr. James: Our legal authority is this: The language of the Emergency Price Control Act in section 201 (b) contains this language:

that the principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place.

Now, that language was adopted before the *Cudahy* decision. That language is just the same as the language in the Fair Labor Standards Act which was one of the things that was dealt with in the *Cudahy* decision. It is our belief, and our legal opinion, that the language was found by the court in that case to be ambiguous and was resolved against the power of

delegation because of the specific legal legislative history, and because of companion provisions in that act.

In that case, for instance, or rather in the Fair Labor Standards Act, for instance, there is a specific authority to delegate the investigating power to subordinates.

There was also in the legislative history, a specific provision allowing the Administrator to delegate the subpoena power, but that was stricken out by both Houses before the bill was passed and became an act.

In addition to that is the fact that it incorporated by reference the subpoena powers of the Federal Trade Commission Act, which did not allow delegation and had been so construed.

Now in the light of all those things, the Supreme Court held that this language in that particular act did not authorize a delegation. On the contrary in our act there is a different legislative history. There is no incorporation by reference of any provisions of any other administrative statutes, and there are no comparable companion provisions in the act itself.

If there is not an authority to delegate in the Price Control Act, then there is no authority in the act for any of the functions of the Administrator. There is nothing in the Price Control Act that corresponds to that specific delegation in the Fair Labor Standards Act of the authority to investigate.

Further, in the legislative history, we have the Senate Committee making this statement, the Senate Banking and Currency Committee. In connection with this particular language involved in this act, which was before the *Cudahy* decision, the Senate committee said:

The Administrator may perform his duties by such employees or agents by delegating to them any of the powers given to him by the bill.

It goes on to say in section 210(b) that the "principal office of the Administrator shall be in the District of Columbia," but authorizes the Administrator or any representative or other agency to whom he

may delegate any or all of his powers to exercise such powers in any place.

Mr. Ford: May I interrupt, Mr. James?

Mr. James: Yes.

Mr. Ford: In view of the legislative history of the act which you quote, and the Supreme Court decision, will you please tell the committee why you persist in delegating the power, the subpoena power, of the Administrator?

Mr. James: Because we felt that under our legislative history, it is authorized by that language in our act.

Mr. Ford: I know, but even the Supreme Court puts the exact language contained in the Emergency Price Control Act in the Fair Labor Standards Act which it decided upon.

Mr. James: That is true.

Mr. Ford: Do you still insist the Supreme Court is wrong?

Mr. James: No; certainly not. Our belief is that the two cases are distinguishable, notwithstanding the fact that the language is the same. The distinction is in this: In that case, the Supreme Court construed that language, feeling it was doubtful in the light of legislative history, and companion provisions of that act to reach one result; inasmuch as the legislative history and the companion provisions in our act are almost, you might say, the reverse of what there was in the Fair Labor Standards Act, we felt that that same language, with that same doubt would be construed by the Court the other way.

The Chairman: The net result is that you are obtaining delegating powers, not through the act itself but through your construction of the legislative history of the act.

Mr. James: Well, I suppose that an act really doesn't stand apart from all of the canons of construction that may be gone into.

The Chairman: Is it your construction of the law that you can use the legislative history to determine proper application of an act when there is no question about the language, when the language is clear?

Mr. James: No, Your Honor; it is not.

The language was sufficiently doubtful in the Fair Labor Standards Act, the same language, for the court in that case to lean heavily on the legislative history and use that as an aid to construction there.

The Chairman: Don't you think you are skating on pretty thin ice?

Mr. James: Your Honor—I am sorry. How do I address you, by the way. I am used to a court.

The Chairman: That is very immaterial.

Mr. James: I want to do it right. Mr. Smith, we think that that is a perfectly tenable legal conclusion, one that we can prevail on. Otherwise, there is no authority to delegate any of the powers under the Price Control Act, and from the very beginning the position was taken that a great many of those powers must necessarily be delegated and they have been delegated, as, for instance, in community prices which were adopted fairly early, where the regional administrator partakes of the very essence of price-fixing power itself.

The Chairman: Is it the result of your conclusion in regard to the subpoena power that you would also have the right to delegate any other power you wanted to delegate under the act?

Mr. James: I should think that the Administrator could have the power to delegate any of his powers.

The Chairman: By construction?

Mr. James: Yes; by construction of that language.

The Chairman: Not by the language itself.

Mr. James: Well, I cannot view language itself as apart from the construction we feel the courts would put on it.

Mr. Hartley: They are agencies of the Government.

The Chairman: Now, what you are aiming to do is to pursue this thing far enough to get a different construction from the Court?

Mr. James: We feel a different construction will be given to it by the Court.

(Whereupon a short recess was taken, after which the meeting was resumed, with Representa-

tive Hartley acting as chairman in Mr. Smith's absence.)

Mr. Ford: Now, Mr. Hartley, if you have some questions in mind, you might ask them, and then I will ask some questions.

Mr. Hartley: I would prefer you to go ahead, because I am at a disadvantage in this whole business, not being an attorney.

Mr. Ford: Mr. James, in order that the record may disclose your exact position with the Office of Price Administration, would you briefly relate that?

Mr. James: I am Director of the Litigation Division of the Enforcement Department of the Office of Price Administration.

Mr. Ford: Then are you authorized to speak for Mr. Emerson, and Mr. Field, Mr. Emerson being enforcement attorney and Mr. Field being general counsel?

Mr. James: I think so, so far as this matter is concerned. Yes, I think so. It is a legal proposition.

Mr. Ford: Then, in the issuance of General Order No. 53, did you prepare that or did someone under you prepare that?

Mr. James: Someone under me prepared that.

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Mr. Ford: Now, coming directly to the point in question, in the issuance of General Order No. 53, did you review the action of the man in preparing that draft?

Mr. James: Yes.

Mr. Ford: Do you review all of the orders which are prepared?

Mr. James: No; I only review the ones that are prepared by the Litigation Division.

Mr. Ford: What was the purpose of the promulgation of that order?

Mr. James: It was a matter of administrative convenience, and putting the responsibility where we felt it could best be performed by the people who really had the facts and really knew the situation; that is, the regional administrators and district directors.

Mr. Ford: Now, did you personally have knowledge of the fact—and I assume you did—of the decision of the *Cudahy Packing Company v. Holland*?

Mr. James: Yes; I did.

Mr. Ford: When this order was prepared?

Mr. James: Yes; I did.

Mr. Ford: And approved by you?

Mr. James: Yes.

Mr. Ford: And you sent it to the Administrator with the knowledge of that decision?

Mr. James: Yes.

Mr. Ford: Now, did somebody else in the Department down there suggest that this order be prepared?

Mr. James: The thing had been talked about for a long time. The position had been taken long before I came there that it would be permissible, that it would be legally permissible. There had been a great deal of discussion about it all along.

Mr. Ford: Who had talked about it generally beside yourself?

Mr. James: Well, I had talked about it, Mr. McChesney and Harry Jones, and all of the other Division directors from time to time, and with Nathaniel Nathanson.

Mr. Ford: Who is he?

Mr. James: Nathaniel Nathanson is an associate general counsel, and he is in charge of the court review and opinions.

Mr. Ford: And you are in charge now of what?

Mr. James: The litigation. His branch has to do with the protests and the Emergency Court of Appeals litigation, and ours has to do with the general litigation in the district courts and State courts, and circuit courts of appeal.

Mr. Stratton: Yours is merely enforcement work and his is appellate work on the protest side.

Mr. James: He is not enforcement at all. We are enforcement.

Mr. Ford: Now, is Mr. Emerson your superior, so to speak?

Mr. James: Yes, I report directly to Mr. Emerson.

Mr. Ford: And he is associate counsel?

Mr. James: He is a Deputy Administrator now. He was associate counsel.

Mr. Ford: In other words, he is one of the high officials of the Office of Price Administration?

Mr. James: He reports directly to Mr. Bowles.

Mr. Ford: And he was acting general counsel at one time?

Mr. James: At one time he was.

Mr. Ford: Did Mr. Emerson tell you at that time that he anticipated the Supreme Court would reverse itself in the event you put such a regulation in effect?

Mr. James: We didn't think it was a case of the Supreme Court reversing itself. We had always thought since the very beginning, that the Supreme Court would probably decide in our favor on our statute because of the differences I have explained to you.

Mr. Ford: You mean from a Government standpoint?

Mr. James: No because of the difference in the legislative history and the companion provisions of the act.

Mr. Ford: You have been practicing law long enough to know that the Supreme Court does not take into consideration the legislative history of an act unless it is ambiguous, haven't you?

Mr. James: That is right.

Mr. Ford: Well, how can you reconcile the legislative history? Did you rely upon the legislative history for the construction?

Mr. James: Yes; because the Supreme Court relied upon legislative history for the construction of the *Cudahy case*.

Mr. Ford: So it did. How do you believe that the legislative history of the Price Control Act will enable the Supreme Court to arrive at a different conclusion, unless they want to reverse their decision?

Mr. James: In the legislative history of the Fair Labor Standards Act, there had been—

Mr. Ford: I am not talking about the legislative history of the Fair Labor Standards Act. But if you want to use that for an explanation, you may do so.

You are perfectly at will to explain as you wish, but I am talking about the legislative history of the Emergency Price Control Act, disregarding the legislative history of the Fair Labor Standards Act. Can you do that and answer my question?

Mr. James: I think so, although our opinion is based on a comparison or rather a contrast between the two legislative histories. The specific thing that was most persuasive, or among the most persuasive things to me in the specific legislative history of the Price Control Act, is the paragraph from the Senate committee report, the Senate Banking and Currency Committee, that says:

The Administrator may perform the duties through such employees or agencies by delegating to them any of the powers given to him by the bill.

That explains the language concerned.

Mr. Ford: You rely upon that explanation as the construction of the law?

Mr. James: We rely upon that in part.

As I say, our position is based on a contrast between the entire legislative history, and the companion provisions of the two acts, the one that gave rise to the construction of the *Cudahy* case, and the one we feel would require a different construction of the language here.

Mr. Ford: Now, to be real frank and honest, which I know you will be, isn't it the desire of the Office of Price Administration to have another test of this very language?

Mr. James: That certainly is not a main consideration at all. We feel that this is legally justified, and we feel that this is a way that eliminates the delays and the roundaboutness of the old system, and puts the real responsibility in the hands of the people who really would have to make the decision anyway, and the people who know most about it, and that that way will be both legal and generally fair.

Now we are perfectly willing to have a court test, but we aren't seeking a court test, and are not going out of our way for it.

Mr. Ford: Doesn't the regulation sort of put you in the way for it?

Mr. James: It is not designed with that in mind. We do not avoid it, but the thing that we are trying to get is not a court test. I mean this very sincerely.

What we seek is not litigation, but a fair and expeditious and legal way of doing a very important thing.

Mr. Ford: Have you ever spoken to the Congress about the legal way to do things?

Mr. James: I haven't; no, sir.

Mr. Ford: Have you suggested to the Administrator, Mr. Emerson, or to Mr. Bowles, or whoever is in charge down there, about the legal way to do things?

Mr. James: You mean about this particular thing?

Mr. Ford: Well, yes. Hasn't that been a serious question in the minds of everybody down in the O.P.A.?

Mr. James: It was not, frankly, a thing that I considered one way or the other. I felt that the present language was adequate.

Mr. Hartley: Mr. Ford, I would like to interject a question at this point.

We have just finished a consideration of the Price Control Act extension. Hearings were held before the Banking and Currency Committee. Don't you think you would have been on much more solid ground and would have had far greater legal authority had you come before the Banking and Currency Committee and suggested that this being necessary, you would like to have had it written into the extension of price control?

Mr. James: I think this is true, sir: That there would be no doubt at all if Congress specifically gave that delegation as a result of that.

Mr. Hartley: Why wasn't that done? To me that is the important issue involved in this regulation. My opinion is, and I am just passing it on for whatever it may be worth, that there is an obvious attempt being made to just bypass the Congress and to legislate these regulations and orders, when, in my opinion, it

would be on much better ground if you came to Congress and asked for the authority.

Now, you had a friendly Banking and Currency Committee, and I would like to know why you didn't come to them and ask them for this authority if it was so necessary and so important to you.

Mr. James: Well, it never occurred to me, frankly. I had felt that from the very first time that I went down there, we had discussed the problem, and we had felt that the authority was there, and it was simply a case of exercising the authority that we felt the act had given us.

Mr. Hartley: You admit, of course, you are likely to be subjected to a challenge on it, don't you?

Mr. James: Yes.

Mr. Hartley: You would be if you had come to Congress and gotten that authority, would you?

Mr. James: I should think not.

Mr. Hartley: Then, will you please tell me why you didn't do that?

Mr. James: Well, so far as I personally am concerned, it just didn't occur to me.

Mr. Hartley: That is just the point that I am getting at. It doesn't seem to occur to you folks in the O.P.A. to come to Congress when you need some authority for your decisions and your acts. You just go ahead and write a regulation. In other words, you write the law.

Mr. James: We are certainly always subject to what the courts decide, sir, and we felt the law gave it to us as it was.

Mr. Hartley: But in the interest of strong and firm price control, you would still be on firmer ground if you had obtained the authority from Congress. You admit that, and I still cannot understand why you did not come to Congress to get it.

Mr. James: We certainly do on a great many things.

Mr. Hartley: I am more concerned with your having done it by regulation than I am by the practical effect of it. In other words, I think my chief complaint with the O.P.A. is that you just seem to want to be a

law unto yourselves and you want to bypass the Congress, bypass the courts, and everybody if you can get away with it.

Mr. James: We certainly do not bypass the courts, and we do not bypass Congress, as I see it.

Mr. Ford: Why do you say the courts in the first instance?

Mr. James: Because my concern is primarily with the courts. I have had no experience with legislative bodies. My practical experience has all been in court as a litigating lawyer. Inevitably I am used to thinking what is legal or not under the terms of an existing statute and probably court decisions or past court decisions under that statute.

Mr. Ford: Where did you say you practiced before you came here?

Mr. James: Connecticut.

Mr. Ford: I am "Citizen A" in Connecticut. You have got a sign hanging up over your door, "Fleming James, Esq." Evidently you are prepared to take care of my problem. I come into your office and I say that a subpoena has been issued against me by such and such blank name, regional attorney or director, whoever you delegated in General Order No. 53. What can I do about it? I don't want to produce my books. It will cost me \$3,000 to haul these things into the Federal courtroom. What would you advise me, in view of the decision in the *Cudahy* case, the exact language appearing now in the statute that you are operating under, and the Fair Labor Standards Act that the court decided in that particular case. What would you tell me?

Mr. James: If I gave him an honest opinion, I would tell him I felt that this case was different because of the differences that underly it.

Mr. Ford: And that I must haul my books in?

Mr. James: I should think that he would have to.

Mr. Ford: I see. I believe that is all, Mr. Chairman.

Mr. Stratton: Mr. James, you said, but I didn't wholly recollect, when you first came to O.P.A.

Mr. James: I think the exact date was October 19, 1942.

Mr. Stratton: You knew of the existence of this memorandum dated March 26, 1942, from Nathaniel L. Nathanson, addressed to David Ginsburg, Thomas Emerson, and others, the one you brought this morning?

Mr. James: Yes, I have seen it in the course of time.

Mr. Stratton: Did you ever discuss with the other attorneys down there the impasse which had been reached as a result of the *Cudahy* case, the doubtfulness of the power to delegate the subpoena?

Mr. James: Yes; we have had several discussions of the legal question.

Mr. Stratton: Did you know that there had been suggested that the Administrator sign hundreds of subpoenas in blank and then send them out over the country to his field officers, who would fill them in and use them?

Mr. James: I first learned of that from you this morning, Mr. Stratton.

Mr. Stratton: I will read you this memorandum which you brought up, and I will offer this in evidence later, and see that you get a copy of it:

The majority opinion in the *Cudahy* case was careful to point out in the issue there decided that it was the authority of the Administrator to delegate the power both to sign and issue a subpoena. In footnote 10, the court alluded to the practice of signing subpoenas in blank and delegating the power to issue already signed subpoenas, and said, "We are not concerned here with the validity of such a practice, since both the signing and issuance of the subpoenas is delegated by the Administrator."

I feel very certain that if a case should arise where the administrator of the Office of Price Administration had signed subpoenas in blank and permitted the regional director to issue them, the vote in the court would be shifted and the *Cudahy* opinion distinguished on this ground.

Now, wasn't there serious consideration of having the Administrator sign subpoenas in blank and forward them to his regional directors?

Mr. James: That was the practice.

Mr. Stratton: And that practice was instituted in order to circumvent the ruling of the *Cudahy* case, was it not?

Mr. James: That is not a question of circumvention.

Mr. Stratton: Perhaps that was an unfortunate word, but I mean in order to avoid having a subpoena declared invalid.

Mr. James: That was the practice that was adopted, because it was felt that that would propose no legal questions whatever.

Mr. Stratton: Doesn't that tend to show that the attorneys in charge of the Office of Price Administration had serious doubts as to the legality of delegating the subpoena power to regional directors?

Mr. James: It would be idle for me to say it is a question that is free from legal doubt. Surely the question has some legal doubt.

Mr. Stratton: I mean aren't there doubts in your mind and the minds of other high officials in the O.P.A. as to the legality of this General Order 63?

Mr. James: Yes; I do not think it is a sure-fire proposition.

Mr. Ford: Doesn't that go back to Mr. Hartley's question as to why, without the sure-fire proposition, you do not come to Congress and make certain proposals for the clarification of the situation?

Mr. James: The situation, as it appeared to me at that time was this: The subpoenas were being issued in blank, signed by the Administrator, as is the practice in the district courts and in a great many of the administrative bodies. That was a burden. Furthermore, it didn't put the responsibility of signing on the person who ought to be the responsible person to make the decision.

I felt that all that was being changed was a matter of form and that there was actually a guaranty of

greater rights, more real consideration to the persons who would be subjected to subpoenas.

In view of that, I did not regard what we did as being a momentous step at all. I must say that it seemed to me one that involved some legal doubts, but where I felt we were legally right and that we ought to do it that way.

Mr. Hartley: Now, on the other hand, it is pretty well understood that the O.P.A. had hoped that the Congress would extend the Price Control Act in a simple resolution without any changes at all, and it wasn't until it became obvious that there were going to be changes that there was any sign of willingness to have these changes made.

Now, was it because of that attitude that no one came to Congress to ask for this change?

Mr. James: I think that the real answer is that I never suggested it because it never occurred to me. So far as I know, it had no relationship to that at all, and I am giving you a very candid answer.

Mr. Hartley: Now, let me ask you this: In the light of this string of views here this morning, do you think it should have some effect on your thinking later on that when you come to one of these questions where there is some doubt that it ought to inspire you to seek relief from the Congress?

Mr. James: Usually that is one of the primary things that we do think of, naturally. Here, as I say, was a change, which, in effect, was really a change in interoffice administration. It wasn't a change that seemed to us to affect substantive rights. I felt, as I say, that it was legally sufficiently clear, so that the other thing did not occur to me. It certainly does usually occur to me.

Mr. Hartley: Has this passage that has been outlined in the court's decision been entered in the record?

Mr. Stratton: } No.

Mr. Hartley: I would like to read this and then ask a question. Speaking of the meaning of this act and so forth, the court said:

The construction of the act which would thus

permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the act has in terms given only to him, can hardly be accepted unless plainly required by its words.

I think you agreed that the authority is not in the law or in the language of the law, but rather you gain the authority through the legislative history. Is that correct?

Mr. James: The two are inseparable, as I see it, sir. That is, the language cannot be viewed apart from the legislative history, nor can the legislative history be viewed apart from the language.

Mr. Hartley: But when the language doesn't give you the authority, you go back to the history to get the authority, is that correct?

Mr. James: I cannot say whether or not the language gives you the authority until you view it in the light of legislative history.

Mr. Ford: Mr. James, you are a lawyer. Let's come down to the legal principles that we were taught back in grade school. How do you arrive at a consideration of the legislative history of the act when it is not ambiguous?

Mr. James: When it is not ambiguous, you don't.

Mr. Ford: What are you doing it for then? It is not ambiguous.

Mr. James: I think it is, and the Supreme Court considered the legislative history and interpreted it in the light of the legislative history.

Mr. Hartley: All right. Let's take another case, and I am going to make a statement of fact as I understand it, and then ask your opinion. And I am speaking of the legislative history of the Wage and Hour Act.

When that measure was before the Congress it was stated definitely by the chairman of the Labor Committee of the House, and others, in support of the legislation that it did not apply, for example, to employees of a department store within a community, and it did not apply to a carpenter or a plumber and all those.

Later on we found that the Wage-Hour Administration applied it to persons such as I have mentioned and the court sustained them. Would you say in the light of the facts that I have given you that the Administrator in the case and the courts were wrong?

Mr. James: No.

Mr. Hartley: Well, the legislative history was absolutely contrary and there is nothing in the law. As a matter of fact, there is an exemption in the Wages and Hours Act to those engaged strictly in intrastate business.

Mr. James: Yes; but as I recall it at the time the court's decision and the Administrator's decision was based on the fact that the work of the people you described was related to interstate commerce so directly as to be a part of it. That is my recollection. I am not sure of my ground.

Mr. Hartley: And of course that was contrary to the legislative history. Every person who spoke on the bill said, "No, these people are exempt."

Mr. James: Yes; the legislative history does not always control, as you suggest. But here was a decision that was on a very narrow ground. It was by an almost evenly divided court. It was a decision in which legislative history was leaned on heavily, the history of the Fair Labor Standards Act, and it was my opinion and the opinion of a great many people that our case was different under those circumstances, because the different legislative history would bring a different result. It is a matter of legal judgment.

Mr. Hartley: Let me ask you this: When this order was promulgated, I issued a statement saying that I was going to ask this committee to look into the question. Did you issue the reply that came from the O.P.A.?

Mr. James: I prepared a reply. I don't know whether that was the one that was issued or not, because I thought that none was issued.

Mr. Hartley: Well, there was a statement. As a matter of fact, in the same New York Times story that had an exclusive, the O.P.A. was quoted as say-

ing, "We are not concerned about any investigation. We are absolutely sure of our position." And you admit yourself this morning that there is some doubt.

Mr. James: Oh, yes. I never have taken the position that it was entirely free from doubt.

Mr. Hartley: There is one other point.

Mr. James: I did not make that statement. I wasn't here, by the way. I wasn't in the office when that statement of yours came out. I was out in the field—I forget where—and I came back the day after.

Mr. Hartley: Just how broad is this authority? Will you state for the record exactly what authority this is to these local administrators all over the United States? How far-reaching is that authority? What can they do under it?

Mr. James: They can do just what the Administrator did before. That is, the facts must be laid before them as to why a subpoena is sought and the terms of the subpoena are laid before them and they determine whether in their discretion a subpoena should issue, and if they determine that it should, they sign and issue it.

Mr. Hartley: And how broad would the subpoena be?

Mr. James: The subpoena has to be specific. That is the requirement.

Mr. Hartley: What may it include?

Mr. James: Well, it may include papers, books, and invoices, relating to certain specific transactions between certain specific dates. Well, it is hard to answer the questions in the abstract.

Mr. Hartley: Well, of course, as I said before, I am at a disadvantage discussing this because I am not a lawyer, but what could it compel a person to bring into the O.P.A.—books and records of all kinds, and what else?

Mr. James: So far as compelling him to produce is concerned, it would be limited to documents. It might also compel a man to come and testify.

Mr. Hartley: And could it also compel a person who might be involved indirectly—for example, an agent for a piece of property?

Mr. James: Yes.

Mr. Hartley: And all his records?

Mr. James: It couldn't be so broad as to cover all his records. It would have to describe them specifically.

Mr. Hartley: Suppose it described them as the complete records, for example, on all other pieces of property for which he happened to be agent, even though the owners of those properties were not involved in this particular case?

Mr. James: Well, there is very often no case pending when one of these subpoenas is issued. The subpoena may issue primarily for two reasons: One would be to investigate conditions in connection with promulgating a price or rent regulation to get background information to know what is a proper and fair regulation, and the other would be an investigation by the Enforcement Division

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Mr. Stratton: Mr. James, I would like to refer you again to this memorandum of Nathaniel Nathanson. He says:

I feel very certain that if a case should arise where the administrator has signed subpoenas in blank and permitted the regional director to issue them, the vote in the court would be shifted and the Cudahy opinion distinguished.

Now, while he feels very certain that he would be on sound ground if that were done, and that, as a matter of fact, was done for a couple of years, evidently he felt very uncertain that if the Administrator had simply delegated the subpoena power that such delegation would stand up in court.

As a result of that evident feeling of uncertainty, the Office of Price Administration for 2 whole years followed the practice of signing the subpoenas in blank so as to be on safe ground.

Now, what has happened in recent months to cause the Office of Price Administration to change their policy? Has there been a decision of the Supreme Court which you felt modified the ruling of the Cudahy decision?

Mr. James: No; we never have changed our policy or our thinking. Mr. Nathanson has always felt that the delegation was proper. I know that from talking to him.

Now, there has been no important thing that has caused this change. It was a change that I did not regard as important. It was a change of simply making the form correspond to the substance, as it has been described already. All the Administrator did was to sign the subpoenas in blank and the actual responsibility for issuance was in the same people to whom the authority to sign is now delegated.

I felt that all that was involved here was a matter of putting the responsibility for signing where it really belonged, in the people who had the real responsibility for issuance.

Mr. Stratton: I don't think anybody will argue with you about the practicality of delegating that responsibility to the party issuing the subpoena, but Mr. Nathanson said he felt certain that the signing of subpoenas in blank and issuing them out to the issuing party was O.K. He didn't say he felt certain that delegating the entire subpoena power was legal. When did the opinion in the Office of Price Administration change so that you arrived at the conclusion that the delegation of the subpoena was a legal delegation?

Mr. James: So far as I know, it has never changed. That is, it is still today that which is there described as a legal certainty, and this is on a plane of somewhat greater doubt.

Mr. Stratton: Now, wasn't it patent at the time this memorandum was issued and the policy inaugurated of signing subpoenas in blank that it would be more practical to delegate the responsibility of signing subpoenas? Isn't it pretty obvious that that is the better practice?

Mr. James: The practice as of now?

Mr. Stratton: Yes.

Mr. James: Yes, I would think so; and, as you suggest, it was felt that the somewhat greater legal doubt inhibited it.

Now, the only change that has taken place in the meantime has been the gradual increasing of the burden on the Administrator.

Mr. Stratton: Since there is no argument as to the greater practicality of delegating the subpoena power, it seems there was sufficient legal doubt at the time this memorandum was issued to cause the Office of Price Administration to avoid an attempt to delegate the subpoena power. I am interested to find out when that doubt was removed, and how.

Mr. James: Well, it is not, as I have said right along, entirely free from legal doubt now. But with the increasing administrative burden and the fact that the opinion had always been that it was legally justifiable, the decision finally got made and it was made, by the way, earlier than the time it came out.

Harold Craske was just delayed in getting the order drawn up.

Mr. Ford: Where is he from, incidentally?

Mr. James: New York City.

Mr. Stratton: The only way to have finally resolved that doubt would have been to have received specific authorization for the delegation of that power.

Mr. James: A court decision would resolve it.

Mr. Stratton: And if you had received from the Congress a specific authorization, you would have avoided the possibility of litigation. It would be very expensive to the Government and even more expensive to the private individual who would be burdened with taking the case through the various steps up to the Supreme Court.

Mr. James: If they had given it to us, but certainly this is true. You never can tell what will happen if you put the thing directly up to Congress, I suppose. As I say, it wasn't considered by me, but so far as the wisdom of a course of action is concerned, a situation may very well arise where you have language that you feel legally supports what you are doing and which was intended that way at the time when it was enacted, and that you feel you might get an entirely different result at a later time when the temper of things is changed.

Mr. Ford: What do you mean "temper of things"?

Mr. James: If the attitude of Congress toward the agency changed, or something like that. That isn't a thing considered in this case.

Mr. Ford: What you really mean is the temper of the courts, don't you?

Mr. James: No; I didn't mean that, sir.

Mr. Ford: You didn't?

Mr. James: No.

Mr. Ford: I didn't exactly understand what you meant.

Mr. James: What I meant was simply that if you asked for a clarifying amendment later, you might not get it even though Congress would have originally enacted it at the time it was passed.

Mr. Ford: Isn't it the purpose of the O.P.A. to try to get in litigation this very question in order to get the court to reverse itself?

Mr. James: No.

Mr. Ford: Have you discussed that?

Mr. James: Yes.

Mr. Ford: And you thought the court would reverse itself?

Mr. James: We didn't feel it would be a case of reversal. We thought we would get a different decision in this case than in the *CUDAHY PACKING COMPANY* case.

Mr. Ford: Don't you know as a lawyer that this case is right in the face of the *Cudahy Packing* case?

Mr. James: No, I don't sir.

Mr. Ford: I beg your pardon for pressing you that far.

Mr. Hartley: Mr. James, is there any question in your mind as to how Congress would have acted had you made the request during the just past consideration of the extension of price control?

Mr. James: I really just don't know, sir.

Mr. Hartley: Let me ask you this: Have you followed the history of the legislation we have just passed?

Mr. James: A good deal of it, sir.

Mr. Hartley: Don't you know that as a matter of

fact, the so-called court review provisions in the present bill were written by the O.P.A.? Don't you know that Mr. Field helped write that?

Mr. James: Well, he certainly was consulted in it, I do know that, but it wasn't written by us.

Mr. Hartley: Well, it was in all practical effects, if the word of the members of the Banking and Currency Committee can be accepted, because I was told definitely by one of the members of the committee that Mr. Field collaborated in the writing of that court review provision.

Mr. James: Well, of course, your knowledge is infinitely greater than mine is on that.

Mr. Hartley: I am telling you that a member of the Banking and Currency Committee, who was a member of the conference, told me that, and what I am getting at is you had a very friendly Banking and Currency Committee that in my opinion would have accepted this beyond any question of doubt.

Mr. James: I think probably that is true. Now, what you are suggesting is that I made an error in judgment in not taking one course rather than another. I can certainly see some doubt as to the wisdom of what I have done, in view of all you suggest. All I can say is that this was a thing that we had considered all along under the present language, and had felt to be that way under the present language, that at the time the change came to be made, it was really a ministerial change, a change in form and not in substance, and that I didn't think legislation was necessary, nor did it occur to me to seek it.

Mr. Hartley: Nor did anyone else in the O.P.A. in the Division that should be concerned about it? No one else suggested, "We might go to Congress and ask them to give us this authority." Didn't anybody ever bring that up?

Mr. James: I am sure it must have been brought up. I don't specifically recall the conversations over this, which occurred over a long period of time, and at the time that this change in the procedure came, I don't remember any suggestions. I cannot remem-

ber everything that has been said over the whole period of time I have been there.

Mr. Hartley: I should imagine you might recall whether or not that was ever suggested, whether it would be better to go to Congress and get the relief or just assume the authority.

Mr. James: Well, it is scarcely a case of just assuming the authority, if the authority is already there and it is a question of legal judgment whether it is already there.

Mr. Hartley: I realize that. I want to ask you another question: What part will Mr. Polier have in this, as far as these subpoenas are concerned? Will he have any dealing in the issuance of these subpoenas, and so forth?

Mr. James: No; the issuance of the subpoenas is delegated only to the district directors and I should say first the regional administrators and the district directors. They are the ones who are vested with the discretion to sign and issue and he is not one of those.

Mr. Hartley: Well, I will ask you specifically: Will Mr. Polier have the authority to run all over the country issuing subpoenas?

Mr. James: He cannot sign and issue a subpoena under this.

Mr. Hartley: He could not?

Mr. James: No; he is not given authority to do that, nor anyone else in his position.

Mr. Hartley: In your interpretation of the law, do you see anything in the law that might later on give him that authority? Do you think the Administrator under the act has the authority to delegate that to him?

Mr. James: Yes; I think the Administrator has the legal authority to delegate it to him, but this is true: The subpoena power has been very carefully preserved in the administrative part of the agency and not given to the enforcement part of the agency. As I say, there has been no essential change. This order works no essential change, and that is why I didn't give it the serious consideration that I perhaps should have as to the various ways of doing it.

There certainly isn't any tradition or any predisposition to grant the subpoena power to the enforcement side of the agency, and I know that it won't be done.

Mr. Hartley: But in your interpretation of the act, and if this authority is correct, Mr. Bowles would have the authority to let Mr. Polier issue subpoenas?

Mr. James: Yes; he has the authority to make what would be an unwise delegation, to be sure, just as that would be true under the delegation of any of his powers.

Mr. Hartley: I am glad you agree it would be an unwise delegation of authority.

Mr. James: I think it would be unwise only because I think it would be unwise to delegate the subpoena power to the Enforcement Department, to me, or to Mr. Emerson. I think it should be in the administrative side.

Mr. Hartley: Have you completely explained the extent to which the subpoena power can be used? Are you satisfied that you have?

Mr. James: Well, I think so, unless you have some specific question.

Mr. Hartley: I asked you to explain how broad this authority was in your opinion.

Mr. James: Yes.

Mr. Hartley: And I am asking you whether or not you have explained that for the record.

Mr. James: Well, I think so. The requirement is that a subpoena must be specific. It must contain a specific description of what is desired. The way that is usually made specific is that it described documents pertaining to certain named transactions, or with certain named people between certain given dates. That is the practice generally in connection with the subpoenas.

Mr. Hartley: Could it force a person to bring in his bankbooks?

Mr. James: Yes; I think so.

Mr. Hartley: His savings accounts?

Mr. James: You mean the records of his savings accounts?

Mr. Hartley: Yes; I mean his bank book which shows how much money he has in the bank and his checking account.

Mr. James: Yes; I think it could.

Now, of course, this subpoena like any other subpoena, is subject to privilege, and if a man claims privilege, then if he still is compelled to testify, immunity is thereby granted to him from any criminal or penal liability arising out of the transactions about which he testifies. That is a fairly usual procedure.

Mr. Hartley: Could it compel a farmer, for example, to give the O.P.A. information concerning how many chickens he had and how many eggs they laid a day, and what price he was getting for his eggs, and all the details of his farm? I am interested in that. I am a farmer.

Mr. James: Yes; I think it could.

Mr. Hartley: Could it force him to tell, for example, how many jars of jelly his family had preserved for the winter, and all that?

Mr. James: Yes; it could, I think. That certainly might very well be relevant to a rationing inquiry as to sugar allotments. That, by the way, would not be under the Price Act, but under the Second War Powers Act, where the powers are very similar.

Mr. Hartley: Of course, they are all interwoven.

Mr. James: Yes; but I just wanted to explain that.

Mr. Stratton: Mr. Chairman, I think it would probably be wise to insert in the record the exact provisions of the Price Control Act which defines and delegates the subpoena power. Section 202(c) reads:

For the purpose of obtaining any information under subsection (a), the Administrator may, by subpoena, require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

Subsection (a) reads:

The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to

assist him in enforcing any regulation or order under this act, or in the administration and enforcement of this act and regulations or orders and price schedules thereunder.

At Mr. James' suggestion, I will also read subsection (d) of section 202:

The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy) or has entered into a stipulation with the Administration as to the information contained in such document.

I would like the record to show that an exhibit was offered, consisting of a memorandum from Mr. Nathaniel L. Nathanson, dated March 26, 1942, this being the memorandum from which the quotations have been made.

(the document referred to was marked "Exhibit No. 581.")

Mr. Ford: Mr. Chairman, do you want to adjourn?

Mr. Hartley: The meeting will be adjourned subject to the call of the chairman.

(Whereupon, at 12 o'clock noon, the hearing was adjourned.)

7

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 583

PHILIP B. FLEMING, Temporary Controls
Administrator, *Petitioner*

v.

MOHAWK WRECKING and LUMBER COMPANY,
a Partnership, and Harry Smith, *Respondent*.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Sixth District

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF
MOTION TO VACATE ORDER OF DECEMBER
16, 1946, ALLOWING SUBSTITUTION OF
PHILIP B. FLEMING, ADMINISTRATOR,
OFFICE TEMPORARY CONTROLS
FOR PAUL A. PORTER, AD-
MINISTRATOR, OFFICE OF
PRICE ADMINISTRATION**

BROWN, FENLON & BABCOCK,
*Attorneys for Respondent
and Moving Party.*
By: John W. Babcock.

DAVID A. GOLDMAN,
*Of Counsel,
On the Brief.*

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IN THE
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OFFICE TEMPORARY CONTROLS
FOR PAUL A. PORTER, AD-
MINISTRATOR, OFFICE OF
PRICE ADMINISTRATION**

Believing that the brief of appellant filed in opposi-
tion to Respondent's Motion to Vacate Order of De-
cember 16, 1946, allowing the substitution of Philip
B. Fleming, Administrator, Office of Temporary Con-
trols for Paul A. Porter, Administrator, Office of Price

Administration presents arguments properly the subject of refutation, respondent respectfully submits this reply brief to the end that the court be fully advised of the erroneous conclusions sought to be drawn by appellant.

Summarized, the action taken by the President in transferring the functions of the Price Administrator to the Temporary Controls Administrator is sought to be justified under authority of (a) First War Powers Act, (b) Section 201(b) of the Emergency Price Control Act. Consideration is given to the position so taken as presented to the court.

I. The First War Powers Act Authorized the Creation of an Agency Such as the Office of Temporary Controls to Receive Transferred Powers.

Though conceding that the language of the First War Powers Act does not specifically state that the President may create a new agency which will consolidate the functions and powers previously exercised by other agencies, the Temporary Controls Administrator argues that the statute has always been construed by the Executive Department to confer such authority. The interpretation of the Executive Department of the Government has been recognized by the court as meriting consideration *where ambiguous statutes are involved*, but this rule has no application where to attempt to follow the construction sought would simply mean overriding the plain language of the law. (*Koshland v. Helvering*, 298 U.S. 441; *Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 42 Am.

Jur., page 405, Section 82, and cases there cited.) The argument of "executive construction" cannot be urged upon this court now that such construction is challenged, notwithstanding general acceptance and acquiescence in the past occasioned by reason of a period of national emergency. To give full weight to this contention of the Temporary Controls Administrator—that the President has the power to act as he has acted because the President has concluded that he has the power—places the entire argument within the meaning of the phrase "*l'etat, s'est moi.*" (I am the state).

Furthermore, in presenting the action taken by the Executive Department in reliance upon the First War Powers Act it seems significant that the Temporary Controls Administrator fails to cite a single agency, particularly of Congressional creation, *abolished* by the President and which had its functions transferred to a *new* agency created by the President.

In this connection the language of the court in the case of *Bowles v. Johnson*, January 30, 1947, C.C.H. Price Control Service, paragraph 52,622 is apropos.

"Counsel for plaintiff calls attention in his brief to the fact that Congress has time and time again appropriated funds for various agencies that have been consolidated by executive order, or directive. By so doing Congress has acquiesced in the executive construction of the First War Powers Act which gave the President sweeping powers and authority to consolidate, modify, and streamline the various war agencies. Attention is called further to the fact that money was appropriated for the Offices of Defense Transportation, Economic Stabilization, Scientific Research and De-

velopment, War Information, War Mobilization, Reconversion, War Relocation, and others. The appropriation of such funds for these offices by the Congress might be considered as an acquiescence and approval of such continuing legislation and activities. However, the court discovers upon scrutinizing these appropriations for the various agencies mentioned, that the agencies are all auxiliaries or arms of some offshoot of the executive branch of government. They are agencies of or within, the executive framework, or department of government, which brings them well within the meaning of the War Powers Act. Those agencies which are creatures of Congress are not mentioned.

"Executive Order No. 9809 of December 12, 1946, is the first example of the President usurping authority to legislate in a field which had been solely occupied by Congress over a sector of war time control which had not been subjected to executive responsibility of authority. Since the President relies upon empowering acts which do not give him the authority granted, the act of creating the Office of Temporary Controls as a liquidating agency for the gradual diminution of the price control restrictions was invalid and without authority." California Municipal Court, City of Long Beach, County of Los Angeles, No. 52643 (Emphasis added).

In our main brief we demonstrated that the First War Powers Act constitutes no authority for the President to abolish an agency created by Congress in its entirety and to seek to transfer the duties and functions to a new agency created by the President, particularly where the Administrator of the Congressional agency can only be appointed to the office with the advice and consent of the Senate. Little is said in reply to the contention, yet, it would appear to be

sufficient in support of this position to point to the clear language of Section 604 of the First War Powers Act (50 U.S.C.A., App. Sec. 604) limiting the power of the President to a report to Congress where the President concludes "that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely." In addition, however, we respectfully call the attention of the court to the statement made by Representative Gwynne of Iowa, a member of the Judiciary Committee of the House who served on the subcommittee in charge of the First War Powers Act, of the express limitation upon executive action to abolish departments or bureaus and transfer their functions elsewhere. In explaining the bill on the floor of the House, Representative Gwynne said:

"There is no use of denying the fact that this / Title I / gives the President tremendous powers to reshuffle bureaus and commissions, and to take the duties and powers from one Government commission or corporation and put them somewhere else. There are, however, certain limitations. For instance, there is no authority granted to consolidate executive departments, and no authority is given to abolish a bureau or an agency. The President's authority there is limited to making a report to the Congress before taking further action" / Emphasis added /. Congressional Record, Vol. 87, Part 9, 77th Cong., 1st Sess., p. 9862.

By settled rules of statutory interpretation the explanation of a bill by a member of the committee in charge of the bill is entitled to great weight. See *Wright v. Vinton Branch*, 300 U.S. 440, 459, 463 (1937); 2 *Sutherland on Statutory Construction* (3rd Ed.),

§ 5012. It is thus clear, both from the text of § 604 of the statute and from the clear exposition by Representative Gwynne of the limitations therein placed on executive action, that the action taken by the President in Executive Order 9809, abolishing the Office of Price Administration, was clearly beyond the authority granted to the Chief Executive by the Congress.

But, it is argued that current Congressional proceedings show Congress' acceptance of the action taken in Executive Order 9809 in the appropriation of funds by the Congress to the Office of Temporary Controls, and it is argued that under the cases of *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 and *Brooks v. Dewar*, 313 U.S. 354, Congress has ratified the President's action in Executive Order 9809.

It is submitted that a careful reading of the cases cited do not support the position taken. In the former case, the point was put at rest by affirmative action of the Congress by passage of the Merchant Marine Act of 1936, Sec. 204(a), the functions of the former Shipping Board are referred to as "now vested in the Department of Commerce pursuant to Sec. 12 of the President's Executive Order No. 6166" (300 U.S. 139, 147-148).

In the latter case, the action taken by an agent of Congress, the Secretary of the Interior, under a statute of the Congress was the subject of consideration. The court, in arriving at its conclusion, appears to have placed great reliance upon the form of the Appropriations Act which was cited in a footnote, and by specific enumeration of the uses to which such money was to be expended effected "a ratification of

the action of the Secretary as the agent of Congress in the administration of the act" (313 U.S. 354, 361). Here, the power of the President to transfer duties and functions from a Congressional agency requiring the confirmation of the Administrator chosen by the Chief Executive by the Senate, to an Executive agency created by President requiring only Presidential designation of the Administrator is in issue. It is submitted the *Brooks* case cannot be relied upon by the Temporary Controls Administrator.

Moreover, consider the form of the Appropriation Act passed. The sum of \$7,051,752 is "to be available for the payment of terminal leave only", and the proviso omitted by appellant in quoting the Section declares: "That it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947."¹

¹ The complete applicable text of H.R. 1968 is as follows: H.R. 1968, Title I—General Appropriations * * * Executive Office of the President, Office for Emergency Management * * * Office of Temporary Controls. Salaries and Expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,051,752, to be available for the payment of terminal leave only; provided, that it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947.

Title II—Reductions in appropriations and Authorizations. Amounts available to the departments and agencies from appropriations and other funds are hereby reduced in the sums hereinafter set forth; such sums to be carried to the surplus fund and covered into the Treasury immediately upon the approval of this Act:

Executive Office of the President, Office for Emergency Management * * * Salaries and Expenses, Office of Price Administration functions, Office of Temporary Controls, 1947, \$2,000,000: provided that the Office of Price Administration shall be discontinued and its affairs shall be entirely liquidated not later than June 30, 1947.

Rather than constituting approval and ratification of the President's action, it is submitted that the action of Congress simply amounts to a recognition on the part of Congress that a claim for terminal leave on the part of Government employees should be paid.

Nor does the case of *California Lima Bean Growers Association v. Bowles*, 150 Fed. (2d) 964 referred to by the Temporary Controls Administrator as having exhaustively treated the whole subject of the First War Powers Act have any application here since it dealt only with the transfer of certain limited functions of an agency under Section 601 of the First War Powers Act and was in no way concerned with the transfer of all functions and the abolition of an agency under Section 604.

II. Even If the Transfer is Invalid Under the Provisions of the First War Powers Act Alone, It Can Be Sustained Under Section 201(b) of the Emergency Price Control Act.

By the same token, no reliance can be placed in any way upon the language of Section 201(b) of the Emergency Price Control Act, 1942, to justify the attempted transfer in toto of the duties and functions of the Administrator, Office of Price Administration, to the Administrator, Office of Temporary Controls. That section simply authorizes the President "to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government

having other functions relating to such commodity or commodities" * * *. Language of such express, limited application cannot be misconstrued to encompass a transfer of all duties and functions of the Price Administrator to a new office and new officer.

As far as respondent has been able to ascertain through diligent search of the authorities as to the date of the filing of this reply brief there have been but five (5) cases passing on the merits of the point under consideration and such cases have only been reported unofficially. They are as follows:

Porter v. Wilson, U.S. District Court, Oregon, Civil No. 3393, January 25, 1947 (C.C.H. Price Control Service, Par. 52,622);

Porter v. Ryan, U.S. District Court, Oregon, January 8, 1947, 15 Law Week, Page 2390;

Bowles v. Johnson, California Municipal Court, City of Long Beach, County of Los Angeles, No. 52643, January 30, 1947 (C.C.H. Price Control Service, Sec. 52,625);

Porter v. Hirdhara, U.S. District Court, Territory of Hawaii, Civil No. 760 and 761, January 29, 1947 (C.C.H. Price Control Service Par. 52,628);

Porter v. Goodwin, U.S. District Court for Western Missouri, November 1, 1946, 15 Law Week, Page 2278.

In each and all of the foregoing cases the court has either denied motions to substitute Philip B. Fleming, Temporary Controls Administrator for the plaintiff,

Administrator of the Office of Price Administration or refused to enforce the Emergency Price Control Act, 1942, as amended, on one ground or the other set forth in respondent's main brief.

The argument advanced by appellant thus finds no support either by examination of the clear language of the First War Powers Act itself or by judicial construction of that Act and analysis of the entire problem by the lower courts who have had occasion to go into the merits of the argument.

CONCLUSION

We feel compelled to point out that the appellant's brief serves only to emphasize that except where the order relates to functions in reality those of the President administered by the Office of Price Administration, the action taken by the President under Executive Order 9809 was beyond his authority and cannot be legally justified. It is reiterated that the duties of an office created by Act of Congress which specifically requires confirmation by the Senate of an Administrator of such office cannot by Executive fiat be transferred to an office and officer not so confirmed. Acquiescence during a period of emergency cannot be made the basis for assumption of power not granted when such assumption of power is challenged through the judicial process.

Respectfully submitted,

**BROWN, FENLON
& BABCOCK,**

*Attorneys for Respondent
and Moving Party.*

By: John W. Babcock.

DAVID A. GOLDMAN,
Of Counsel,
On Brief.

Dated: March, 1947.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 583.

PHILIP B. FLEMING, Temporary Controls Administrator,
Petitioner,

MOHAWK WRECKING AND LUMBER COMPANY
a Partnership, and Harry Smith,

ON MOTION OF RESPONDENTS TO VACATE ORDER OF THIS COURT
PERMITTING SUBSTITUTION OF TEMPORARY CONTROLS
ADMINISTRATOR FOR PRICE ADMINISTRATOR
AS PETITIONER.

**BRIEF OF SINGER SEWING MACHINE
COMPANY, AMICUS CURIAE.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 583.

PHILIP B. FLEMING, Temporary Controls
Administrator, Petitioner

v.

MOHAWK WRECKING AND LUMBER COMPANY,
a Partnership, and Harry Smith.

On Motion of Respondents to Vacate Order of This Court
Permitting Substitution of Temporary Controls
Administrator for Price Administrator
as Petitioner.

**BRIEF OF SINGER SEWING MACHINE
COMPANY, AMICUS CURIAE.**

This brief is submitted on behalf of Singer Sewing Machine Company, a New Jersey corporation, *amicus curiae*, consent thereto having been obtained from petitioner and respondents. It is submitted in connection with the motion of the respondents to vacate an order of this court substituting Philip B. Fleming, Temporary Controls Administrator, for Paul A. Porter as petitioner, and it relates only to the following issue:

Were the functions of the Price Administrator of the Office of Price Administration validly transferred to the Administrator of the Office of Temporary Controls by Executive Order 9809?

If the functions of the Price Administrator were not validly transferred to the Administrator of the Office of Temporary Controls, then, of course, Philip B. Fleming was not entitled to be substituted as petitioner in this proceeding.*

SUMMARY OF ARGUMENT.

I. The office and functions of the Price Administrator were created by Congress in the Price Control Act and the President had no authority to transfer those functions in the absence of a grant of such authority to him by Congress.

II. The transfer by Executive Order 9809 of the functions of the Price Administrator to the Temporary Controls Administrator was not authorized by the Price Control Act.

A. The transfer of the functions of the Price Administrator to the Temporary Controls Administrator was not a transfer of functions "with respect to a particular commodity or commodities".

* The interest of Singer Sewing Machine Company in this proceeding arises from the fact that it is the defendant in an action (in the District Court of the United States for the Western District of Missouri entitled "*Paul A. Porter, Price Administrator, Office of Price Administration, v. Singer Sewing Machine Company*. Civil No. 4021") in which Philip B. Fleming, Temporary Controls Administrator, has moved to be substituted as plaintiff. Singer Sewing Machine Company has opposed that motion upon the ground, *inter alia*, that the functions of the Price Administrator were not validly transferred to the Temporary Controls Administrator by Executive Order 9809.

- B. The transfer of the functions of the Price Administrator to the Temporary Controls Administrator was not a transfer of functions to a department or agency "having other functions relating to such commodity or commodities."
- C. The blanket transfer of all powers and functions of the Office of Price Administration terminating the existence of that Office was not authorized by Section 201(b).

III. The transfer by Executive Order 9809 of the functions of the Price Administrator to the Temporary Controls Administrator was not authorized by Title I of the First War Powers Act.

- A. The authority of the President under Title I of the First War Powers Act to consolidate and transfer the functions of agencies was limited to agencies in existence at the date of enactment thereof and therefore did not extend to the Office of Price Administration which was subsequently created.
- B. The consolidation of the Office of Price Administration and the transfer of its functions to the Office of Temporary Controls was not authorized by the First War Powers Act because such consolidation and transfer was not a matter "relating to the conduct of the present war".
- C. In any event, the Price Control Act placed the functions of the Price Administrator outside the purview of the First War Powers Act.

ARGUMENT.

POINT I.

The office and functions of the Price Administrator were created by Congress in the Price Control Act and the President had no authority to transfer those functions in the absence of a grant of such authority to him by Congress.

The Emergency Price Control Act of 1942 (50 U. S. C. A. App. Sec. 901, *et seq.*) was passed by Congress in the valid exercise of the war powers delegated to Congress in the Constitution (U. S. Constitution, Article 1, Section 8, Clause 11; *Yakus v. U. S.*, 321 U. S. 414, 88 L. Ed. 834; *Bowles v. Willingham*, 321 U. S. 503, 88 L. Ed. 892). The Act provides for its administration by an agency created by the Act, the Office of Price Administration, and provides that there shall be at the head of that agency an officer, the Price Administrator, whose position and office are also created by the Act. The Act further provides that the Price Administrator shall be appointed by the President by and with the advice and consent of the Senate.* The major part of the statute is devoted to a description of the functions which are conferred upon the Price Administrator (Sections 2, 5, 6, 201(c) and (d), 202, 203, 205 and 301; 50 U. S. C. A. App. Sections 901, 903, 906, 921(c), 921(d), 922, 923, 925 and 931). These sections describe in detail the powers and duties, in a word, the functions, of the

* Section 201(a) of the Act provides as follows:

"Sec. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the 'Administrator'). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum."

Price Administrator, and provide for the exercise of those functions by the Price Administrator, the officer appointed and qualified in accordance with the provisions of Section 201(a).

As both the office and the functions of the Price Administrator were created by Congress, and as Congress has validly conferred those functions upon the Price Administrator alone, any transfer of those functions by the President to another administrative officer in the absence of Congressional authority to do so would be an attempt by the executive to alter or repeal the provisions of the Price Control Act and would be unconstitutional and void. U. S. Constitution, Article 1, Section 1; *Campbell v. Galeno Chemical Co.*, 281 U. S. 599, 74 L. Ed. 1063; *International Railway Co. v. Davidson*, 257 U. S. 506, 66 L. Ed. 341; *U. S. v. Eaton*, 144 U. S. 677, 36 L. Ed. 591; *U. S. v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

The Congressional statutes relied upon as providing authority for the transfer of the Price Administrator's functions by Executive Order 9809* are the Price Control Act itself and Title I of the First War Powers Act (50 U. S. C. A. App. Sections 601-605). Neither statute authorizes such transfer. These statutes will be discussed in Points II and III hereof, respectively. At this point, however, it may be pointed out that the present state of the authorities on the issue of Philip B. Fleming's right to substitution is that in every reported case in which the issue has been raised and argued, the court has held that Philip B. Fleming was not entitled to be substituted. *Porter v. Wilson*, U. S. D. C. Ore., January 25, 1947 [C. C. H.

* The applicable provisions of Executive Order 9809 are set out in Appendix "A" hereof.

War Law Service, Price Control, Par. 52622]; *Porter v. Hirahara*, U. S. D. C. Hawaii, January 29, 1947 [C. C. H. War Law Service, Price Control, Par. 52628]; *Porter v. Ryan*, U. S. D. C. Ore., January 8, 1947, 15 Law Week 2390; *Bowles v. Johnson*, Cal. Mun. Ct., January 30, 1947 [C. C. H. War Law Service, Price Control, Par. 52625]. We are advised that there are three unreported cases, in one of which, *Fleming v. Taylor*, U. S. D. C. Tex., Feb. 21, 1947, Civil No. 2303, it was held that Philip B. Fleming was not entitled to be substituted, and in two of which, *Porter v. Kay Ferer Inc.*, U. S. D. C. Mo., Feb. 26, 1947, Civil No. 3946 (no opinion) and *Porter v. Bowers*, U. S. D. C. Mo., Mar. 20, 1947, Civil No. 4144, it was held he was entitled to be substituted.

POINT II.

The transfer by Executive Order 9809 of the functions of the Price Administrator to the Temporary Controls Administrator was not authorized by the Price Control Act.

The only provisions of the Price Control Act which authorize any transfer of any function conferred by that Act upon the Price Administrator are contained in Section 201(b). That section, covering the entire field of transfers of functions of the Price Administrator, provides as follows:

“(b) The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration *with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or*

commodities and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred." (Italics added.)

The authority of the President to transfer the powers and functions of the Price Administrator thus is expressly limited by Section 201(b) to transfers of powers and functions "with respect to a particular commodity or commodities" which are made to a department or agency "having other functions relating to such commodity or commodities". The functions transferred by Executive Order 9809 were not functions "with respect to a particular commodity or commodities". The agency to which they were transferred was not one "having other functions relating to" the same commodity or commodities to which the functions transferred related. Furthermore, in no circumstances was there authority to make a blanket transfer of all powers and functions of the Office of Price Administration terminating the existence of that office. These points we will discuss in the order mentioned.

A. The Transfer of the Functions of the Price Administrator to the Temporary Controls Administrator Was Not a Transfer of Functions "With Respect to a Particular Commodity or Commodities".

It is apparent on the face of Executive Order 9809 that the powers and functions attempted to be transferred were *not* those relating to a particular commodity or commodities. No commodity was named or described or even referred to in the Order and it purported to transfer all functions of the Price Administrator. The functions transferred were not even limited to functions relating to commodities then subject to price control, but included even those relating to commodities no longer subject to control. In other words, the Order purported to transfer all functions relating to every commodity which at any time ever had been subject to any price control. The Order contains the following provision:

"The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the price administrator (including any such proceedings now pending.)"

The Price Administrator's functions included the bringing and maintaining of injunction suits under Section 205(a) and treble damage actions under Section 205(e) relating to any commodity as to which violations of the Act occurred during the time that commodity was subject to price control. By this provision alone, without reference to those which by their terms specifically transfer all functions, the Order transfers functions relating to every commodity which at any time ever had been subject to any control, that is, functions relating to the maintaining of suits,

whether injunction or treble damage suits, for violations of regulations relating to each and every such commodity.

Thus by its terms Executive Order 9809 sought to transfer functions of the Price Administrator which related to the full range of the almost innumerable commodities formerly subject to the Administrator's price regulations. The transfer of functions of the Price Administrator relating to such thousands of unnumbered, undesignated commodities not particularized anywhere in the Order cannot be described as a transfer of functions "with respect to a particular commodity or commodities."

B. The Transfer of the Functions of the Price Administrator to the Temporary Controls Administrator was not a Transfer of Functions to a Department or Agency "Having Other Functions Relating to Such Commodity or Commodities."

Not only was the attempted transfer not a transfer of functions relating to a particular commodity or commodities, but, in addition, it was not a transfer of functions to a department or agency "having other functions relating to such commodity or commodities". Apart from those functions of the Price Administrator which the Order purported to transfer to it, the Office of Temporary Controls did not have or acquire functions relating to each of the thousands of different commodities formerly subject to price control.

C. The Blanket Transfer of All Powers and Functions of the Office of Price Administration Terminating the Existence of that Office Was Not Authorized by Section 201 (b).

The attempted transfer is invalid because it attempts to transfer *all* functions of the Office of Price Administra-

tion. If Executive Order 9809 were effective in accordance with its terms it would abolish the Office of Price Administration and the position of Price Administrator. This is shown by the provision for the "consolidation" of the Office of Price Administration in the Office of Temporary Controls and for the "vesting" of the Price Administrator's functions in the Temporary Controls Administrator. These euphemistic terms do not conceal the fact that the effect of the Order is to eliminate entirely the Office of Price Administration, an agency and an office created by Congress to administer the Price Control Act. Authority to accomplish such result is clearly negatived by Section 201(b). That section contemplates that no transfer of functions of the Price Administrator made thereunder would completely divest him of all of his functions or destroy his position and his agency. The section authorizes a transfer of "*any* of the powers or functions of the Office of Price Administration. . . ." If Congress had intended to authorize a transfer of *all* of the Price Administrator's functions, it would have so provided, but such a blanket transfer was not contemplated, as shown by the requirement that a transfer be of functions relating to a particular commodity or commodities and that the transfer be made to an agency having functions relating to such commodity or commodities. A power to transfer which is so limited and so circumscribed is inconsistent with a power to make a complete transfer of all functions of the Price Administrator.

The intent and understanding of the Congress, as disclosed by Section 201(b), that the President was not authorized to make such a blanket transfer is again shown in the Price Control Extension Act of 1946, which amended the

Price Control Act by adding thereto a new Section 1A(c)(2) providing as follows:

"(2) On or before *April 1, 1947*, the President shall report to the Congress what, if any commodities or classes of commodities, including housing accommodations, are in such critically short supply as to necessitate in his judgment, the continuance of the powers granted by this Act as to them after *June 30, 1947*, together with his recommendations as to established departments or agencies of the Government (*other than the Office of Price Administration*) which should be charged with the administration of such powers."

This section shows that Congress intended that the Office of Price Administration should continue as the agency administering the Price Control Act until the termination date and it effectively negatives any intention to authorize the President alone to transfer all functions of the Price Administrator.

Section 201(b) carefully and precisely defines and delineates the power of the President to transfer the Price Administrator's functions. That power is limited to transfers of functions with respect to a particular commodity or commodities which are made to agencies having other functions relating to such commodity or commodities. There are also precise provisions which enumerate the instances in which a transfer of functions to the Price Administrator is authorized. Congress thereby completely covered the field of authorized transfers of functions from or to the Price Administrator and excluded the exercise by the President of any power to transfer not enumerated in Section 201(b).

It was logical and consistent for Congress to permit a transfer only in the specified instances enumerated in Section 201(b). The powers and functions conferred upon the Price Administrator by the Price Control Act made him one of the most powerful Administrators in the Government and the very nature of price control required that he be given broad discretionary powers in order to accomplish the purposes of the Act. Mindful of the tremendous power to affect the economy of the country and the welfare of its citizens which was conferred upon the Price Administrator by the Price Control Act and mindful of the equally tremendous breadth of the discretion conferred upon him, *Congress provided that the Administrator was to be appointed by and with the advice and consent of the Senate.* In dealing with the transfer provisions, Congress of course was aware that to the extent a transfer of functions was authorized such a transfer might be made to an officer not subject to Senate confirmation. Undoubtedly it was for this reason that the transfer provisions (which follow in the statute immediately after the requirement that the Administrator's appointment be confirmed by the Senate) were drawn so as to authorize only those transfers specifically enumerated in Section 201(b). Any other construction would render nugatory the requirement that the Administrator's appointment must be confirmed by the Senate, for unless the transfer authority is limited to the instances enumerated in the statute, it is then possible to make a transfer of *all* of the Administrator's functions to an officer not confirmed by the Senate. Such a construction would be a perversion of the evident Congressional purposes in requiring Senate confirmation.

POINT III.

The transfer by Executive Order 9809 of the functions of the Price Administrator to the Temporary Controls Administrator was not authorized by Title I of the First War Powers Act.

The President states in Executive Order 9809 that his power to accomplish the transfer of functions therein attempted derives in part from Title I of the First War Powers Act (50 U. S. C. A. App. Sections 601-605). Title I of the First War Powers Act provides as follows:

"TITLE I—COORDINATION OF EXECUTIVE BUREAUS IN THE INTEREST OF THE MORE EFFICIENT CONCENTRATION OF THE GOVERNMENT.

"§601. Coordination of executive bureaus, offices, etc., by President for national defense and to prosecute the war; issuance of regulations

"For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, * * *. *Provided further*, That the authority by this title granted shall

be exercised only in matters relating to the conduct of the present war."

"§602. Same; consolidation of offices; transfer of duties, personnel and records.

In carrying out the purposes of this title the President is authorized to utilize, co-ordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto."

"§604. Presidential recommendation to Congress for elimination of certain bureaus, offices, etc.

Should the President, in redistributing the functions among the executive agencies as provided in this title conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper."

These provisions of the First War Powers Act did not authorize the transfer by Executive Order 9809 of the Price Administrator's functions to the Temporary Controls Administrator because (1) the President's authority to consolidate agencies and to transfer functions is limited to agencies in existence at the time the First War Powers Act was enacted, and therefore that authority did not extend to the Office of Price Administration, which was subsequently created, (2) the consolidation of the Office of Price Administration and the transfer of its functions to the Office of Temporary Controls was not a "matter relat-

ing to the conduct of the present war"; and (3) in any event, the Price Control Act placed the functions of the Price Administrator outside the purview of the First War Powers Act which therefore has no application to the attempted transfer.

A. The Authority of the President under Title I of the First War Powers Act to Consolidate and Transfer the Functions of Agencies was Limited to Agencies in Existence at the Date of Enactment Thereof and Therefore did not Extend to the Office of Price Administration Which was Subsequently Created.

Title I of the First War Powers Act must be read and interpreted as a whole so that all of its provisions may be given effect without conflict or inconsistency. Section 1 states the purposes of the Title and the general authority granted to the President thereunder to make redistribution of functions among executive agencies. Section 2 then prescribes and defines precisely the specific and sole authority which is granted to the President to effectuate such purposes and authority. He is authorized to "utilize, coordinate or consolidate" agencies "now existing by law" and to "transfer any duties or powers from one existing . . . agency . . . to another." Section 4 provides that should the President, in redistributing functions among executive agencies, conclude that any bureau should be abolished and its or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper. In both sections there are explicit limitations upon the power of the President. In Section 2 his power to utilize, coordinate or consolidate agencies and to transfer their functions is limited to those agencies *then existing by law*. In Section 4 his power with respect to the abolition of agencies is limited to the power to recommend abolition to Congress.

The First War Powers Act was enacted December 18, 1941 and the Office of Price Administration was not then in existence, it having been created thereafter by the Emergency Price Control Act of 1942. Executive Order 9809 by its terms purports to "consolidate" the Office of Price Administration into a new agency and to transfer all duties, powers and functions of the Price Administrator to such new agency and, accordingly, on its face, is in direct contravention of the limitations imposed on the President's authority by the First War Powers Act.

There was logic of course in limiting the power to consolidate or to transfer functions of agencies to those agencies in existence at the time of the enactment of the statute. There was no necessity of legislating then as to the power of the President to consolidate or transfer the functions of agencies created by Congress subsequent thereto. In later enactments creating such agencies Congress could make any provision it desired for their consolidation or the transfer of their functions. And this very course was followed by Congress in later enacting the Price Control Act which, as we pointed out in Point II, contained specific provisions in Section 201 (b) thereof which conferred upon the President a limited power to transfer functions of the Office of Price Administration.

Recognition that the President's authority to consolidate agencies or to transfer the functions of agencies under the First War Powers Act was limited to agencies in existence at the date of enactment thereof appears from the Executive Orders issued by the President under that Act which consolidated or transferred the functions of agencies. Without exception, every such Executive Order consolidated or transferred functions of agencies which were (1) *created prior to the enactment of the First War Powers Act* or (2) *if created subsequent thereto, were cre-*

ated solely by Executive Order of the President or by some lesser administrative official. (Of course, the President needed and was exercising none of the powers conferred by the First War Powers Act when he consolidated or transferred the functions of agencies created by his own executive order or by order of his subordinates. Such agencies were his own creatures; as such he had the power to destroy them, to consolidate them, or to transfer their functions as he pleased.) We have compiled in Appendix B hereto all Executive Orders of the President purporting to have been issued under authority of the First War Powers Act which consolidated or transferred functions of agencies, together with the names of the agencies and the date and manner of their creation. *Every one of the agencies involved in these Executive Orders was an agency which was created prior to the enactment of the First War Powers Act or, if created subsequent thereto, was created solely by Executive Order of the President or by order of his subordinates.* The fact that the President has never before attempted under the provisions of the First War Powers Act to consolidate or transfer functions of agencies created by Congress subsequent to the enactment of said Act is persuasive evidence that the President has heretofore always considered that the statute, when it provides in Section 2 that the power granted to the President to consolidate and transfer the functions of agencies is limited to agencies in existence at the date of enactment of the First War Powers Act, means exactly what it says.

California Lima Bean Growers Ass'n v. Bowles, 150 F. (2) 984 (Em. Ct. App. 1945), has been relied upon and cited repeatedly by Philip B. Fleming as a holding that the First War Powers Act granted the President power to transfer functions of an agency created after the date of the enactment of the Act. That case stands for no such

proposition. It dealt only with a transfer of subsequently created functions of an agency, the *Department of Agriculture*, which existed when the *First War Powers Act* was enacted. There is no question but that the *First War Powers Act* applies to subsequently created functions of an agency which existed at the date of the enactment of the Act. No contention is made to the contrary. That, however, does not settle the question, and in fact has no relation to the question, as to whether functions of a subsequently created agency can be transferred. The *First War Powers Act* by express terms provided that it applied to functions of agencies then existing.

B. The Consolidation of the Office of Price Administration and the transfer of its Functions to the Office of Temporary Controls was not Authorized by the First War Powers Act Because such Consolidation and Transfer Was Not a Matter "Relating to the Conduct of the Present War".

The authority conferred upon the President by Title I of the *First War Powers Act* is expressly made subject to the following proviso:

"Provided, further, that the authority by this title granted shall be exercised only in matters relating to the conduct of the present war." (Section 1).

That proviso is not a mere time limitation which can be satisfied by a transfer consummated within a prescribed period. On the contrary, it imposes a substantive requirement, namely, that whenever the authority may be exercised it must be exercised *only* "in matters relating to the conduct of the present war." Thus, exercise of the authority during the period of hostilities, or even during the period while the war was being conducted, would not satisfy the

requirement. The requirement could be satisfied only by the exercise of the authority in a matter relating to the conduct of the war.

The phrase "conduct of the present war" denotes action, which distinguishes it from time limitations which relate to the mere existence of a "state of war." "Conduct" of the war denotes the actual carrying on or prosecution of the war, the taking of affirmative action with respect to the war. Webster defines "conduct" as follows:

"Act or manner of carrying on, directing, or managing, as a business management; direction. Christianity has humanized the *conduct* of war."

And "war" is defined as follows:

"The state or fact of exerting violence or force against another, not only against a state or other politically organized body; especially a contest by force between two or more nations or states, carried on for any purpose; armed conflict of sovereign powers; declared and open hostilities." (Webster *New International Dictionary*, 2d Ed. Unabridged).

Thus, "conduct of the present war" means the carrying on or directing of an armed conflict between nations. The attempted transfer of the Price Administrator's functions was not a matter relating to the "conduct of the present war," for at the time the transfer was attempted such of the price control functions as remained in existence had no relation to the carrying on or directing of an armed conflict between nations. Prior to December 12, 1946, the policy of the government had become a policy of price decontrol, rather than price control.* At that time the func-

* See the Price Administrator's Supplementary Order 193 (Fed. Reg. Nov. 14, 1946, p. 13464) which exempts all commodities from price control except sugar, rice and rents; see also Statement of the President directing the abandonment of price controls except over sugar, rice and rents, C. C. H. War Law Service, Price Control, Par. 41, 371.

tions of the Price Administrator had become functions of liquidating and winding up the remnants of price control. In these circumstances, the transfer of the functions of the Price Administrator was not a matter relating to the carrying on of an armed conflict between nations, a conflict which had terminated more than a year prior thereto. The Order itself recognizes this fact, for it states that the Order is issued "for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the government."

C. In any event, the Price Control Act Placed the Functions of the Price Administrator Outside the Purview of the First War Powers Act.

Even if Title I of the First War Powers Act had authorized transfers of functions of agencies subsequently created, such authority would not extend to the functions of the Price Administrator, for the authority to transfer those functions was prescribed by the Price Control Act. The power the Congress had given to the President in general terms in the First War Powers Act was subject to such exceptions, restrictions or limitations which Congress might provide in later statutes. Congress in Section 201(b) of the Price Control Act specifically covered the subject of transfers of functions to or from the Price Administrator and thereby fixed the limits of the President's power to transfer the Price Administrator's functions. In so doing Congress, as shown above in Point II, C (page 11), limited and restricted the President's powers when applied to transfers of the Price Administrator's functions to those transfers authorized by Section 201(b). When broad-general statutory provisions cover a subject matter covered by specific statutory provisions on the same subject matter the specific provisions are given effect in accord-

ance with their terms and are interpreted as creating an exception to the general provisions. *Missouri v. Ross* (1936); 299 U. S. 72, 81 L. Ed. 46; *McKee v. U. S.*, 164 U. S. 287, 41 L. Ed. 437; *Townsend v. Little* (1883) 109 U. S. 504, 27 L. Ed. 1012; *Durousseau v. U. S.*, 6 Cranch 308, 3 L. Ed. 232; *U. S. v. Hess*, (C. C. A. 8, 1934) 71 F. (2d) 78; *Jackson v. Chi. R. I. & P. Ry. Co.* (1910) 178 Fed. 431. This rule of construction is applicable even if the specific provisions are contained in a statute passed prior to the statute containing the general provisions. *A fortiori*, the rule has its strongest and most imperative application when, as here, the specific provisions are contained in a statute passed subsequently to the one containing the general provisions.

Conclusion.

The transfer by Executive Order 9809 of the functions of the Price Administrator to the Temporary Controls Administrator was not authorized by Congress.

Respectfully submitted,

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Dated: March 27, 1947.

APPENDIX "A".

APPLICABLE PROVISIONS OF EXECUTIVE ORDER 9809, 11 FED. REG. 14281

Providing for the Disposition of Certain War Agencies

By virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, Section 201(B) of the Emergency Price Control Act of 1942, as amended, and Section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of \$12,000 per annum unless the congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price

Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the price administrator (including any such proceedings now pending) . . .".

APPENDIX "B".

EXECUTIVE ORDERS PURPORTING TO HAVE BEEN ISSUED UNDER AUTHORITY OF THE FIRST WAR POWERS ACT WHICH CONSOLIDATED EXECUTIVE OR ADMINISTRATIVE AGEN- CIES OR TRANSFERRED THE FUNCTIONS THEREOF.

1. *Executive Order 9070* of February 24, 1942, consolidates the following agencies to form the National Housing Agency:

Agency	Date of Creation	Manner of Creation
Federal Housing Administration	1934	48 Stat. 1246.
Federal Home Loan Bank Board	1932	47 Stat. 736.
Home Owners Loan Corporation	1933	48 Stat. 128.
Federal Savings and Loan Insurance Corporation	1934	48 Stat. 1256.
United States Housing Authority	1937	50 Stat. 889.
Defense Homes Corporation	Oct. 18, 1940	Incorporated pursuant to letter from President to Secretary of Treasury.
Division of Defense Housing Coordination	Jan. 11, 1941	Executive Order 8632.
Coordinator of Defense Housing	1940	By advisory Commission to Counsel of National Defense.

2. *Executive Order 9071* of February 24, 1942, transfers to the Department of Commerce all functions of the following agency:

Federal Loan Agency.....	Apr. 25, 1939	Reorganization Plan I, pursuant to Reorganization Act of 1939.
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3. *Executive Order 9082* transfers functions among various branches of the following agency:

Army of the United States (War Department)	Aug. 7, 1789	1 Stat. 49.
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4. *Executive Order 9083* of February 28, 1942, transfers to the Bureau of Customs and to the United States Coast Guard functions of the following agencies:

Agency	Date of Creation	Manner of Creation
Bureau of Marine Inspection and Navigation.....	June 30, 1932	47 Stat. 415 as amended by 49 Stat. 1380.
Bureau of Customs.....	Mar. 3, 1927	44 Stat. 1381.
U. S. Maritime Commission	June 29, 1936	49 Stat. 1985.

5. *Executive Order 9126* of April 4, 1942, transfers to the Chief of Naval Operations the duties and functions of the following agencies:

Hydrographic Office and Naval Observatory, Bureau of Navigation.....	July 5, 1862	12 Stat. 510.
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6. *Executive Order 9142* of April 21, 1942, transfers to the Alien Property Custodian certain functions of the following agency:

Department of Justice.....	June 22, 1870	1 Stat. 92; 16 Stat. 162.
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7. *Executive Order 9182* of June 13, 1932 consolidates the following agencies or functions thereof to form the O. W. I.:

Office of Facts and Figures..	Oct. 24, 1941	Executive Order 8922.
Office of Government Reports	Sept. 8, 1939	Executive Order 8248.
Coordinator of Information	July 11, 1941	Presidential Order.
Division of Information of the Office for Emergency Management	Feb. 28, 1941	Letter of President to Liaison Officer, Office for Emergency Management.

8. *Executive Order 9198* of July 11, 1942 transfers to the Administrator of War Shipping Administration functions transferred to the following agency by paragraph 5 of *Executive Order 9083* of February 28, 1942 (*infra*):

U. S. Coast Guard.....	Jan. 28, 1915	38 Stat. 800.
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9. *Executive Order 9232* of August 20, 1942, transfers to the Bureau of the Census, Department of Commerce, the following agency and its functions:

Sample Surveys Section of the Work Projects Administration	May 6, 1935	Executive Order 7034 under authority of 49 Stat. 115.
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10. *Executive Order 9245* of September 16, 1942, transfers to the Secretary of the Interior the functions, powers and duties of the following office:

Agency	Date of Creation	Manner of Creation
U. S. High Commissioner to the Philippine Islands.....	Jan. 17, 1933	47 Stat. 765; 48 Stat. 460.

11. *Executive Order 9247* of September 17, 1942, transfers to the War Manpower Commission in the Office for Emergency Management in the Executive Office of the President the following agencies or functions thereof:

U. S. Employment Service....	July 1, 1939	Reorganization Plan I, Part 2, Secs. 201 and 203.
National Youth Administration	June 26, 1935	Executive Order 7086, under authority of 78 Stat. 115.
Apprenticeship Training Service, in the Office of the Federal Security Administrator	Aug. 16, 1937	50 Stat. 664.
Federal Security Administrator	Apr. 25, 1939	Reorganization Plan I.

12. *Executive Order 9280* of December 5, 1942, consolidates the following agencies or transfers functions thereof:

War Production Board.....	Jan. 16, 1942	Executive Order 9024.
Agricultural Conservation and Adjustment Administration	Feb. 23, 1942	Executive Order 9069.
Farm Credit Administration	July 17, 1916	39 Stat. 360, as amended by 42 Stat. 1454; Executive Order 6084 of March 27, 1933.
Farm Security Administration	Apr. 30, 1935	Executive Order 7027, pursuant to 49 Stat. 115; present name adopted by Secretary of Agriculture's Memorandum 732 of September 1, 1937.
Division of Farm Management and Costs of the Bureau of Agricultural Economics	May 11, 1922	42 Stat. 532.

Agency	Date of Creation	Manner of Creation
Office of Agricultural War Relations	May 5, 1941	Letter of the President.
Agricultural Marketing Administration	Feb. 23, 1942	Executive Order 9069.
Sugar Agency of the Agricultural Conservation and Adjustment Administration	May 12, 1933	48 Stat. 31, as amended by 50 Stat. 903.
Bureau of Animal Industry	May 29, 1884	23 Stat. 31.
13. <i>Executive Order 9287</i> of December 24, 1942, transfers to the Secretary of the Interior certain functions of the following agency:		
Council of National Defense	1916	39 Stat. 649.
14. <i>Executive Order 9302</i> of February 9, 1943, transfers functions of the following agency to the Commissioner of Internal Revenue:		
Department of Justice.....	June 22, 1870	41 Stat. 92; 16 Stat. 162.
15. <i>Executive Order 9310</i> of March 6, 1943, transfers functions of the following agency to the Department of Agriculture:		
Office of Defense, Health and Welfare Services.....	Sept. 3, 1941	Executive Order 8890.
16. <i>Executive Order 9315</i> of March 15, 1943, transfers certain functions of the following Office to the Secretary of Agriculture:		
Officer	Date of Creation	Manner of Creation
President of the United States	Sept. 17, 1787	Const. Art. II, Sec. 1.
17. <i>Executive Order 9322</i> of March 26, 1943, consolidates the following agencies or functions thereof to form the War Food Administration:		
Agency	Date of Creation	Manner of Creation
Food Production Administration	Dec. 5, 1942	Executive Order 9280.
Food Distribution Administration	Dec. 5, 1942	Executive Order 9280.
Commodity Credit Corporation	1933	48 Stat. 195.
Extension Service	1923	42 Stat. 1289.
Secretary of Agriculture.....	May 15, 1862	12 Stat. 387 as amended by 25 Stat. 659.

18. *Executive Order 9330* of April 16, 1943, transfers to the Office of Price Administration, the War Production Board and the U. S. Civil Service Commission functions of the following agency:

Agency	Date of Creation	Manner of Creation
Division of Central Administrative Services of the Office for Emergency Management	Feb. 28, 1941	Letter of President to Liaison Officer, Office for Emergency Management

19. *Executive Order 9332* of April 19, 1943 transfers personnel, records, property and funds of the following agency to the Solid Fuels Administration for War:

Agency	Date of Creation	Manner of Creation
Office of Solid Fuels Coordination for National Defense	Nov. 5, 1941	Letter of the President

20. *Executive Order 9338* of April 29, 1943, transfers to the Federal Security Administrator all functions of the following agency:

Agency	Date of Creation	Manner of Creation
Office of Defense, Health and Welfare Services	Sept. 3, 1941	Executive Order 8890.

21. *Executive Order 9339* of April 29, 1943, transfers to the Department of War the following agencies or functions thereof:

Agency	Date of Creation	Manner of Creation
Civil Air Patrol	May 20, 1941	Executive Order 8757, as amended by Executive Order 9134.
Office of Civilian Defense	May 20, 1941	Executive Order 8757, as amended by Executive Orders 8799, 8822 and 9134.

22. *Executive Order 9357* of June 30, 1943, transfers to the Federal Works Administrator all functions of the following agency:

Agency	Date of Creation	Manner of Creation
Public Works Administration	June 16, 1933	48 Stat. 200.

23. *Executive Order 9361* of July 15, 1943, transfers to the Office of Economic Warfare the following agencies or functions thereof:

Agency	Date of Creation	Manner of Creation
Board of Economic Warfare	July 30, 1941	Executive Order 8839, as amended by Executive Order 8982.

Agency	Date of Creation	Manner of Creation
United States Commercial Co.	Mar. 27, 1942	As subsidiary of R. F. C.
Rubber Development Corp.	Feb. 20, 1943	Announced by Secretary of Commerce.
Petroleum Reserve Corp.	June 30, 1943	Established by order of R. F. C.
Export-Import Bank	Feb. 2, 1934	Executive Order 6581, pursuant to 48 Stat. 195, as amended.
24. <i>Executive Order 9380</i> of September 25, 1943, consolidates the following agencies:		
Office of Lend-Lease Administration	Oct. 28, 1941	Executive Order 8926.
Office of Foreign Relief and Rehabilitation Operations	Nov. 21, 1942	Announced by the White House.
Office of Economic Warfare	July 15, 1943	Executive Order 9361; organized to take over functions of Board of Economic Warfare created by Executive Order 8839 of July 30, 1941, as amended by Executive Order 8982 of December 17, 1941.
Office of Foreign Economic Coordination	June 24, 1943	State Department Order.
25. <i>Executive Order 9385</i> of October 6, 1943, transfers to the Foreign Economic Administration functions of the following agencies:		
War Food Administration.	Mar. 26, 1943	Executive Order 9322.
Commodity Credit Corp.	Oct. 16, 1933	Executive Order 6340, pursuant to 48 Stat. 195.
26. <i>Executive Order 9406</i> of December 17, 1943, transfers to the Chairman of the War Production Board, functions of the following offices:		
Secretary of War.	Aug. 7, 1789	1 Stat. 49.
Secretary of the Navy.	Apr. 30, 1798	1 Stat. 553.
27. <i>Executive Order 9423</i> of February 16, 1944, transfers to the Secretary of the Interior all functions of the following agency:		
War Relocation Authority.	Mar. 18, 1943	Executive Order 9102.

28. *Executive Order 9475* of September 7, 1944, transfers all functions of the following agency to the W. P. B. and to the Rubber Reserve Company:

Agency	Date of Creation	Manner of Creation
Office of Rubber Director....	Dec. 18, 1941	Executive Order 9246

29. *Executive Order 9541* of April 20, 1945, transfers the following agency to the Department of Commerce:

Agency	Date of Creation	Manner of Creation
Office of Surplus Property of the Procurement Division of the Department of the Treasury.....	June 10, 1933	As part of the Procurement Division established by Executive Order 6166 under authority of 47 Stat. 1517.

30. *Executive Order 9577* of June 30, 1945, transfers to the Secretary of Agriculture all functions of the following agency:

Agency	Date of Creation	Manner of Creation
War Food Administration.	Mar. 26, 1943	Executive Order 9322

31. *Executive Order 9608* of August 31, 1945, transfers to the Interim International Information Service, State Department, and Bureau of the Budget all functions of the following agencies:

Agency	Date of Creation	Manner of Creation
Office of War Information..	June 13, 1942	Executive Order 9182
Office of Inter - American Affairs	July 30, 1941	Executive Order 8840. Renamed by Executive Order 9532 of March 21, 1945.

32. *Executive Order 9620* of September 21, 1945, transfers to the Office of War Mobilization and Reconversion the functions of the following agencies:

Agency	Date of Creation	Manner of Creation
Office of Economic Stabilization	Oct. 3, 1942	Executive Order 9250

33. *Executive Order 9621* of September 21, 1945, transfers to the State Department and to the War Department all functions of the following agency:

Agency	Date of Creation	Manner of Creation
Office of Strategic Services	June 13, 1942	Military Order.

34. *Executive Order 9630* of September 27, 1945, as amended by Executive Order 9730 of May 27, 1946, transfers to the State Department, the Department of Commerce, the Department of Agriculture and the R. F. C. the following agencies or functions thereof:

Agency	Date of Creation	Manner of Creation
Foreign Economic Administration	Sept. 25, 1943	Executive Order 9380.
Rubber Development Corporation	Feb. 20, 1943	Announced by Secretary of Commerce
Petroleum Reserve Corporation	June 30, 1943	Established by R. F. C.
U. S. Commercial Company	Mar. 27, 1942	As subsidiary of R. F. C.
Army - Navy Liquidation Commissioner	Jan. 27, 1945	War Department Memo. No. 850-45; letter of Secretary of the Navy dated February 1, 1945.
War Department	Aug. 7, 1789	1 Stat. 49.
Navy Department	Apr. 30, 1798	1 Stat. 553.
35. <i>Executive Order 9638</i> of October 4, 1945, transfers to the Civilian Production Board the functions of the following agency:		
War Production Board.....	Jan. 16, 1942	Executive Order 9024.
36. <i>Executive Order 9699</i> of February 25, 1946, reestablishes the Office of Economic Stabilization and transfers back to it all functions designated in <i>Executive Order 9620</i> (supra).		
37. <i>Executive Order 9762</i> of July 26, 1946; retransfers to the Office of War Mobilization and Reconversion the functions of the following agency:		
Office of Economic Stabilization	Oct. 3, 1942	Executive Order 9250. Re-established February 25, 1946, by Executive Order 9699 (supra).

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 583.

PHILIP B. FLEMING, Temporary Controls Administrator,
Petitioner.

MOHAWK WRECKING AND LUMBER COMPANY,
a Partnership, and Harry Smith.

ON MOTION OF RESPONDENTS TO VACATE ORDER OF THIS COURT
PERMITTING SUBSTITUTION OF TEMPORARY CONTROLS
ADMINISTRATOR FOR PRICE ADMINISTRATOR
AS PETITIONER.

**SUPPLEMENTAL BRIEF OF SINGER SEWING
MACHINE COMPANY, AMICUS CURIAE.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 583.

PHILIP B. FLEMING, Temporary Controls
Administrator, Petitioner

v.

MOHAWK WRECKING AND LUMBER COMPANY,
a Partnership, and Harry Smith.

On Motion of Respondents to Vacate Order of This Court
Permitting Substitution of Temporary Controls
Administrator for Price Administrator
as Petitioner.

**SUPPLEMENTAL BRIEF OF SINGER SEWING
MACHINE COMPANY, AMICUS CURIAE.**

Since the filing of our brief *amicus curiae* we have ascertained that the petitioner is contending that even though the transfer of the functions of the Price Administrator to the Administrator of the Office of Temporary Controls, attempted to be made by Executive Order 9809, was illegal and void Congress has validated such transfer by recognizing and accepting it in the Urgent Deficiency Appropriation Act, 1947, Public Law No. 20, 80th Cong., 1st Sess. This supplemental brief is addressed to that point.

Provisions of bills which never became law are cited and quoted as validation by Congress of the transfer. The

Urgent Deficiency Appropriation Act passed by Congress is not quoted and, we believe, it is erroneously referred to as being *substantially the same* as the bills which never became law. The following language, known as Senate Amendment 15, inserted by the Senate in House Bill 1968, and subsequently eliminated therefrom, is relied upon as validation by "the Congress" of the transfer:

"(15) OFFICE OF TEMPORARY CONTROLS

"Salaries and expenses. For an additional amount, fiscal year 1947, for carrying out the functions of the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,991,815, which amount shall be merged with the funds transferred, pursuant to said Executive Order, from the appropriation 'Salaries and expenses', Office of Price Administration, in the Third Deficiency Appropriation Act, 1946. Funds transferred to the Office of Temporary Controls pursuant to Executive Order 9809 in connection with the transfer of functions by said Executive Order shall be available for the payment of claims pursuant to part 2 of the Federal Tort Claims Act (Public Law 601, Seventy-ninth Congress) arising, respectively, from the activity concerned: Provided, That it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947."

The above Senate Amendment 15, however, was never enacted into law. In conference Senate Amendment 15 was amended by substituting for all the matters contained therein the following:

"OFFICE OF TEMPORARY CONTROLS"

"Salaries and expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,051,752, to be available for the payment of terminal leave only: Provided, That it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947." (H. R. Report 104, 80th Cong., 1st Session.)

It is this provision which became law. (Urgent Deficiency Appropriation Act, 1947, Public Law No. 20.)

It will be noted that most significant changes were made. By the conference amendment the words "carrying out the functions of" appearing in Senate Amendment 15 were eliminated. So also were the words "which amount shall be merged with the funds transferred, pursuant to said Executive Order, from the appropriation 'Salaries and expenses', Office of Price Administration, in the Third Deficiency Appropriation Act, 1946." And finally there was also eliminated the entire sentence referring to "the transfer of functions by said Executive Order."

The conference amendment in no respect recognizes, accepts or validates any supposed transfer of the *functions* of the *Price Administrator* to the *Administrator* of the Office of Temporary Controls. It recognizes only the *existence* of the *Office of Price Administration* as an *organizational entity* within the Office of Temporary Controls. As such organizational entity the Office of Price Administration remains the agency created by Congress and it may and should

have appointed as the Administrator thereof, *with the advice and consent of the Senate*, a Price Administrator.

The legislative history of the Deficiency Act shows that the Congress in passing the Act recognized that the Office of Price Administration remained in existence as an organizational entity in the Office of Temporary Controls, but that it in no respect recognized any transfer of the functions of the Price Administrator to the Administrator of the Office of Temporary Controls.

That not only the Office of Price Administration but also the Civilian Production Administration and the Office of War Mobilization and Reconversion were recognized as separate and distinct organizational entities is made so clear in the report of the House Committee on Appropriations on the Urgent Deficiency Appropriation Bill, H. R. 1968, which accompanied that bill's introduction into the House, that there can be no controversy on the question. In this report (H. R. Report No. 36, 80th Cong., 1st Sess.) the Committee on Appropriations said:

"Hearings have been held with respect to the Office of Price Administration, the Civilian Production Administration, and the Office of War Mobilization and Reconversion, and additional rescission *in these agencies* over and above the amounts recommended by the President are included in the bill."
(Italics added.) (p. 4.)

The report continued with a discussion of *each* of these agencies in turn. With respect to the Office of Price Administration the report said:

"OFFICE OF PRICE ADMINISTRATION"

"The Office of Price Administration had appropriations for the fiscal year 1947 in the amount of \$101,000,000, and, through November 30, had obli-

gated \$56,970,000. By that date, all of the control functions of the agency, except a very few had been eliminated and drastic reductions in force were in order; yet the personnel currently on the rolls is approximately one-half the number employed on November 30. Rent control is the largest function left, and on February 1, there were 6,774 employees engaged in rent control as compared with 5,310 on July 1. The sugar program had 2,152 employees on February 1, as compared with 2,375 on July 1. The executive and administrative branches had a total of 1,994 on February 1, as compared with 3,217 on July 1, at a time when the agency was staffed to handle all activities of the Price Control Act; 228 persons are employed in the so-called Public Records Division, which is engaged in closing the records of the Office of Price Administration for delivery to the Archivist, and also in preparing a history of the operations of the agency. The agency contemplates having a minimum of 162 employees in this activity until June 30, 1947.

"It was stated to the committee that the agency had available for expenditure for the last half of the year \$27,649,622, and that it would be necessary to make an additional appropriation of \$5,950,000, in order to meet requirements of the program, \$33,599,622 to June 30, 1947. After lengthy hearings, the committee is convinced that if the residual activities are administered on an economical basis, and all surplus employees are immediately separated from the pay rolls, it will be possible for the agency to discharge its full responsibilities under the law, wind up its affairs, and turn over all necessary records to the Archivist and, at the same time, not only avoid the deficiency, but make possible a rescission of an additional \$9,000,000."

The Managers on the Part of the House of the joint conference between the House and Senate representatives,

in reporting to the House on the conference amendment eliminating all of the language of Senate Amendment 15 and substituting in lieu thereof the language of the bill as finally passed, made the following statement:

"Amendment No. 15. Appropriates \$7,051,752 to the *Office of Price Administration* to be available for the payment of terminal leave only, with a proviso directing the payment out of current funds of all expenses incident to the closing and liquidation of the Office of Price Administration *and* the Office of Temporary Controls by June 30, 1947 instead of an appropriation of \$7,491,815 for general administration and liquidation of the Office of Price Administration, as proposed by the Senate." (Italics added.) (H. R. Report No. 104, 80th Cong., 1st Sess.)

From such legislative history and from the provisions of the Urgent Deficiency Appropriations Act as passed, it seems clear that Congress so far from recognizing the transfer of the functions of the Price Administrator to the Administrator of the Office of Temporary Controls specifically negated such recognition. Before passing the bill (1) the words "carrying out the functions of" were eliminated; (2) the following provision of the Senate proposal was eliminated: "which amount shall be merged with the funds transferred pursuant to said Executive Order, from the appropriation 'Salaries and expenses', Office of Price Administration, in the Third Deficiency Appropriation Act, 1946"; (3) the entire sentence referring to funds transferred to the Office of Temporary Controls "pursuant to Executive Order 9809 in connection with the transfer of functions by said Executive Order" was eliminated; and (4) the appropriation granted was limited solely and expressly to payment of terminal leave only. Thus not one single provision was left which could be said to recognize

the existence in the *Administrator* of the Office of Temporary Controls of any functions that belonged to the *Price Administrator*. The Urgent Deficiency Appropriations Act is in fact a Congressional nonrecognition of the transfer of functions of the Price Administrator to the Administrator of the Office of Temporary Controls.

• Respectfully submitted,

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Dated: March 29, 1947.

SUPREME COURT OF THE UNITED STATES

Nos. 583 AND 512.—OCTOBER TERM, 1946.

Philip B. Fleming, Temporary Controls Administrator, Petitioner,
583 v.

Mohawk Wrecking and Lumber Company, a partnership, and Harry Smith.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

James G. Raley and Thomas E. Raley, Trading as Raley's Food Store, Petitioners,
512 v.

Philip B. Fleming, Temporary Controls Administrator.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 28, 1947.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present the question whether the Emergency Price Control Act, 56 Stat. 23, as amended, 50 U. S. C. App. Supp. V, § 901 *et seq.*, authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas. In the first of these cases the Circuit Court of Appeals for the Sixth Circuit held that such authority did not exist, 156 F. 2d 891; in the second, the Court of Appeals for the District of Columbia held that it did. 156 F. 2d 561. The cases are here on petitions for writs of certiorari which we granted to resolve the conflict.

First. After we granted the petitions we ordered, on motion of the Acting Solicitor General, that Philip B. Fleming, Temporary Controls Administrator, be substituted as a party in each case in place of Paul A. Porter,

Administrator, Office of Price Administration, resigned. Thereafter respondents in the first of these cases filed a motion to vacate the order of substitution, a motion which we deferred to the hearing on the merits.¹ The question has now been briefed and argued and we conclude that the motion to vacate the order of substitution should be denied.

The Act was amended in 1946 to provide for its termination not later than June 30, 1947, saving, however, rights and liabilities incurred prior to the termination date.² By November 12, 1946, almost all commodities (including services) were by administrative order³ made exempt from price control.⁴ Price control had thus entered a temporary transition period. On December 12, 1946, the President issued an Executive Order "for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government." That order consolidated the Office of Price Administration

¹ Compare *Porter v. American Distilling Co.*, — F. Supp. —; *Porter v. Bowers*, — F. Supp. —, and *Bowles v. Ell-Carr Co., Inc.*, — F. Supp. —, with *Porter v. Wilson*, 69 F. Supp. 447, and *Porter v. Hirahara*, 69 F. Supp. 441.

² Pub. L. 548, 79th Cong., 2d Sess. Section 1 (b) now provides:

"The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

³ Express provisions for decontrol were added by the 1946 amendments. See, for example, § 1 A (b)-(h).

⁴ See Supplementary Order 193, November 12, 1946, 11 Fed. Reg. 13464, as amended November 19, 1946, 11 Fed. Reg. 13637.

and three other agencies into the Office of Temporary Controls⁸—an agency in the Office for Emergency Management of the Executive Office of the President. The latter had previously been established pursuant to the Reorganization Act of 1939.⁹ The Executive Order provided a Temporary Controls Administrator, appointed by the President, to head the Office of Temporary Controls and vested in him, *inter alia*, the functions of the Price Administrator, including the authority to maintain in his own name civil proceedings, whether or not then pending, relating to matters theretofore under the jurisdiction of the Price Administrator. Petitioner is the Temporary Controls Administrator appointed by the President.

It is argued that the President had no authority to transfer the functions of the Price Administrator to another agency and to vest in an officer appointed by the President the power which the Emergency Price Control Act, § 201, had conferred upon an Administrator appointed by the President by and with the advice and consent of the Senate. And it is said that even though such authority existed, it came to an end with the cessation of hostilities.

By § 1 of the First War Powers Act of 1941, 55 Stat. 838, 50 U. S. C. App. Supp. V, § 601, the President is

“authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary . . .”

⁸ Exec. Order No. 9809, 11 Fed. Reg. 14281.

⁹ See Reorganization Plan I, 5 U. S. C. § 133t (note); 4 Fed. Reg. 3864; 6 Fed. Reg. 192.

That power may be exercised "only in matters relating to the conduct of the present war," § 1, and expires six months after "the termination of the war." § 401.

On December 31, 1946, after the creation of the Office of Temporary Controls, the President, while recognizing that "a state of war still exists," by proclamation declared that hostilities had terminated.⁷ The cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161, that the war power includes the power "to remedy the evils which have arisen from its rise and progress" and continues during that emergency. *Stewart v. Kahn*, 11 Wall. 493, 507. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here.

Section 1 of the First War Powers Act does not explicitly provide for creation of a new agency which consolidates the functions and powers previously exercised by one or more other agencies. But the Act has been repeatedly construed by the President to confer such authority.⁸ Such construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight. See *United States v. Jackson*, 280 U. S. 183, 193; *Billings v. Truesdell*, 321 U. S. 542, 552-553. And the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the

⁷ Proclamation 2714, 12 Fed. Reg. 1.

⁸ Each of the following agencies was a new agency created by Executive Order to exercise powers formerly vested in other agencies or to perform new functions: National Housing Agency, Exec. Order No. 9070, 7 Fed. Reg. 1529; War Food Administration, Exec. Order No. 9334, 8 Fed. Reg. 5423; Office of War Mobilization, Exec. Order No. 9347, 8 Fed. Reg. 7207; Office of Economic Warfare, Exec. Order No. 9361, 8 Fed. Reg. 9861; Foreign Economic Administration, Exec. Order No. 9380, 8 Fed. Reg. 13081; Surplus War Property Administration, Exec. Order No. 9425, 9 Fed. Reg. 2071.

action of the Chief Executive. *Brooks v. Dewar*, 313 U. S. 354, 361.

Nor do we think there is merit in the contention that the First War Powers Act gave the President authority to transfer functions only from agencies in existence when that Act became law. It is true that § 1 authorizes the President "to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon" any agency. But the latter clause is only an illustration of the authority granted, not a limitation on it. It makes clear that the authority extends to existing agencies as well as to others. That construction is supported by § 5 of the Act which states that upon its termination all executive and administrative agencies "shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding." As stated by the Emergency Court of Appeals, unless § 1 authorizes the President to redistribute functions of agencies created after the passage of the Act, the reference in § 5 to functions "hereafter" provided by law is "wholly meaningless." *California Lima Bean Growers Ass'n v. Bowles*, 150 F. 2d 964, 967. Nor is that result affected by the subsequent enactment of the Emergency Price Control Act which in § 201 (b) authorized the President to transfer any of the powers and functions of the Office of Price Administration "with respect to a particular commodity or commodities" to any government agency having other functions relating to such commodities. Whatever effect that provision may have, it does not purport to deal with general enforcement functions and so restricts in no way the authority of the President under the First War Powers Act to transfer them. Yet enforcement functions are all that are involved in the present cases.

We need not decide whether under the First War Powers Act the President had authority to transfer functions of an officer who need be confirmed by the Senate to one appointed by the President without Senate confirmation. For § 2 of that Act provides:

"That in carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto."

The authority to "utilize . . . offices, or officers now existing by law" is sufficient to sustain the transfer of functions under the Executive Order from Porter, resigned, to Fleming. For prior to the Act Fleming had been appointed by the President and confirmed by the Senate as Federal Works Administrator.* He thus was the incumbent of an office "existing by law" at the time of the passage of the Act and by virtue of § 2 could be the lawful recipient through transfer by the President of the functions of other agencies as well. To hold that an officer, previously confirmed by the Senate, must be once more confirmed in order to exercise the powers transferred to him by the President would be quite inconsistent with the broad grant of power given the President by the First War Powers Act. Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Ad-

* December 4, 1941. See 87 Cong. Rec. 9413.

ministrator.¹⁰ That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-302; *Brooks v. Dewar, supra*.

For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure. The rule requires a showing of "substantial need" for continuing and maintaining the action. Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States v. Hark*, 320 U. S. 531, 536; *Utah Junk Co. v. Porter*, 328 U. S. 39, 44; *Collins v. Porter*, 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act.¹¹ If investigation were foreclosed at this stage, such rights as may exist would be defeated, contrary to the policy of the Act.

Second. We come then to the merits. The Administrator, by order, delegated the function of signing and issuing

¹⁰ Pub. L. 20, 80th Cong., 1st Sess., under the heading "Executive Office of the President, Office for Emergency Management." the following:

"Office of Temporary Controls

"Salaries and expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, \$7,051,752, to be available for the payment of terminal leave only: *Provided*, That it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947."

¹¹ See § 1 (b) *supra*, note 2. And for the general statute preventing the extinguishment of liability under a repealed statute, unless the repealing act expressly provides for it, see Rev. Stat. § 13, as amended, 58 Stat. 118, 1 U. S. C. Supp. V, § 29.

subpoenas to regional administrators and district directors." Section 201 (a) of the Emergency Price Control Act provides in part:

"The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended."

Section 201 (b) of the Act provides:

"The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

Practically identical provisions were included in § 4 (b) and (c) of the Fair Labor Standards Act, 52 Stat. 1060, 1061-1062, 29 U. S. C. § 204. The Court held in *Cudahy Packing Co. v. Holland*, 315 U. S. 357, that the latter provisions did not authorize the Administrator under that Act, to delegate his power to sign and issue subpoenas. Accordingly the main controversy here is whether the *Cudahy* decision controls this case. We do not think it does.

The legislative history of the Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the bill was in Conference. On the other hand, the Senate Committee in reporting the bill that became the Emergency Price Control Act described § 201 (a) as authorizing the Administrator to "perform his duties through such employees or agencies by delegating to them any of the powers given to him by the bill." And it said that § 201 (b) authorized him or "any representative or other agency to whom he may delegate any or all of his powers, to exer-

¹³ Revised General Order 53, May 13, 1944, 9 Fed. Reg. 5191.

else such powers in any place." S. Rep. No. 931, 77th Cong., 2d Sess., pp. 20-21. In the *Cudahy* case the Act made expressly delegable the power to gather data and make investigations, thus lending support to the view that when Congress desired to give authority to delegate, it said so explicitly. In the present Act, there is no provision which specifically authorizes delegation as to a particular function. In the *Cudahy* case, the Act made applicable to the powers and duties of the Administrator the subpoena provisions of the Federal Trade Commission Act, §§ 9 and 10, 38 Stat. 722, 723, 15 U. S. C. §§ 49 and 50, which only authorized either the Commission or its individual members to sign subpoenas. The subpoena power under the present Act is found in § 202 (b)¹³ and is not dependent on the provisions of another Act having a history of its own. The Act involved in the *Cudahy* case granted no broad rule-making power. Section 201 (d) of the present Act, however, provides:

"The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld. See *Plapao Laboratories, Inc. v. Farley*, 92 F. 2d 228. There is no provision in the present Act negating the existence of such authority, so far as the subpoena power is concerned. Nor can the absence of such authority be fairly inferred from the history and content of the Act. Thus the presence of the rule-making

¹³ Section 202 (b) provides in part:

"The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

power, together with the other factors differentiating this case from the *Cudahy* case, indicates that the authority granted by § 201 (a) and (b) should not be read restrictively.

As stated by the court in *Porter v. Murray*, 156 F. 2d 781, 786-787, the overwhelming nature of the price control program entrusted to the Administrator suggests that the Act should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts. The program of price control inaugurated probably the most comprehensive legal controls over the economy ever attempted. We would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction. Certainly, so far as the investigative functions were concerned, he could hardly be expected, in view of the magnitude of the task,¹⁴ to exercise his personal discretion in determining whether a particular investigation should be launched. Delay might do injury beyond repair. The pyramiding in Washington of all decisions on law enforcement would be apt to end in paral-

¹⁴ The following statistics indicate the volume of litigation and investigations involved:

	1943	1944	1945	1946
Civil Cases commenced by United States in District Courts under Emergency Price Control Act.* (Fiscal years ending June 30)...	2,219	6,524	28,283	31,094
Investigations completed by Office of Price Administra- tion.** (Calendar years).	652,851	333,151	193,348	106,240†

* (Rep. Dir. Adm. Off. U. S. Courts (1943) Table 7; *Id.* 1944 Table 7; *Id.* (1945) Table C3; *Id.* (1946) Table C3.)

** (Quarterly Rep. O. P. A.: Eighth, p. 71; Twelfth, p. 75; Seventeenth, p. 104; Eighteenth, p. 82; Nineteenth, p. 95.)

† First nine months only.

ysis. To tempt the Administrator to solve the problem by supplying all his offices with subpoenas signed in blank would not further the development of orderly and responsible administration. These considerations reinforce the construction of the Act which allows the Administrator authority to delegate his subpoena power.

The other objections to the subpoenas are without merit.

We reverse the judgment in *Fleming v. Mohawk Wrecking and Lumber Co.*, and affirm the judgment in *Raley v. Fleming*.

So ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 583 AND 512.—OCTOBER TERM, 1946.

Philip B. Fleming, Temporary Controls Administrator, Petitioner,

583

v.

Mohawk Wrecking and Lumber Company, a partnership, and Harry Smith.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

James G. Raley and Thomas E. Raley, Trading as Raley's Food Store, Petitioners,

512

v.

Philip B. Fleming, Temporary Controls Administrator.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 28, 1947.]

MR. JUSTICE JACKSON, concurring.

I concur in the opinion and result. But the issue here is so related to other problems that I desire to state my grounds.

I would be reluctant to adopt a construction of an Act, such as the Emergency Price Control Act, which would certainly impede its administration unless it were necessary to carry out the intent of Congress or to protect fundamental individual rights.

If the Administrator may not delegate his power to sign subpoenas but must personally sign all subpoenas issued in the process of enforcement throughout the United States, one of two practices would be certain to result. He might sign large batches of blank subpoenas and turn them over to subordinates to be filled in over his signature. Or he might sign batches of subpoenas already made out by subordinates, probably without reading them and cer-

tainly without examining the causes for their issuance or the scope of the information required. The personal signature of the Administrator on the subpoena under those circumstances is no protection to individual rights.

Of all the subpoenas issued by administrative authority, a very small percentage are contested. The important thing for protection of the individual is that when he does have reasons for resisting obedience he can obtain a hearing. I am in doubt as to whether under this Act and the regulations for its administration a person who has reasons for resisting the subpoena has any administrative review or remedy. But in any event he cannot be punished for contempt until a court order for its enforcement has issued and has been disobeyed.

Enforcement of such subpoenas by the courts is not and should not be automatic. So long as they are subject to full inquiry at this point it does not seem to me important to the individual or inconsistent with the policy of Congress that the subpoena issue by a subordinate of the Administrator. If the courts were to be shorn of their power of independent inquiry before enforcement, and I have thought we were tending that way, *cf. dissent in Penfield v. S. E. C.*, March 31, 1947, I should expect Congress to intend greater responsibility at the point of original issue. I concur only because I think adequate judicial safeguards exist.

CLERK'S COPY.

749458
Sub B

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 512

see no. 483

JAMES G. RALEY AND THOMAS E. RALEY,
TRADING AS RALEY'S FOOD STORE, PETI-
TIONERS,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS
ADMINISTRATOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1946.

CERTIORARI GRANTED NOVEMBER 12, 1946.

SUBJECT INDEX

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United States Court of Appeals

DISTRICT OF COLUMBIA

NO. 9171

JAMES G. RALEY AND THOMAS E. RALEY,
PARTNERS, T/A RALEY'S FOOD STORE,
Appellants,

VS.

CHESTER BOWLES, ADMINISTRATOR OF THE
OFFICE OF PRICE ADMINISTRATION,
Appellee.

**Appeal from the District Court of the United States
for the District of Columbia**

JOINT APPENDIX TO BRIEFS

IN THE
DISTRICT COURT OF THE UNITED STATES

1 FOR THE
DISTRICT OF COLUMBIA

IN RE:

JAMES G. RALEY AND
THOMAS E. RALEY, PARTNERS,

T/A RALEY'S FOOD STORE,
2331 Calvert Street, N. W.,
Washington, D. C.

MISC. NO. 152

*Application for an Order to Produce Records in Compliance
with a Subpoena Issued by the Office of Price
Administration*

Chester Bowles, Administrator, Office of Price Administration, applicant herein, applies to this Honorable Court, pursuant to Section 202(e) of the Emergency Price Control Act of 1942, as amended, herein referred to as the "Act," for an order requiring James G. Raley and Thomas E. Raley, partners, trading as Raley's Food Store, to produce certain documents described in a subpoena duces tecum issued by the Administrator pursuant to Section 202(e) of the Act; and in support hereof respectfully represents as follows:

1. Respondents are owners and operators of a retail grocery store under the name of Raley's Food Store at 2331 Calvert Street, N. W., Washington, D. C., within this judicial district and have custody and control of the records of said retail grocery establishment.

2. Jurisdiction of this proceeding is conferred upon this court by Section 202(e) of the Emergency Price Control Act of 1942, as amended, (56 Stat. 23, 765., 57 Stat. 566, Public Law 383, 78th Cong., Executive Order 9250, 7 F. R. 7871, Executive Order 9328, 8 F. R. 4681).

3. Prior to the second day of August 1945 applicant, as Administrator for the Office of Price Administration, deemed that an investigation to determine whether James G. Raley and Thomas E. Raley, trading as Raley's Food Store, their agents and employees had or had not complied with the provisions of the Act and regulations issued thereunder was proper to assist him in the administration and enforcement of the Act and regulations and orders thereunder.

4. On August 2, 1945, applicant, acting pursuant to the power and authority conferred upon him by said Act, issued a subpoena duces tecum directing respondent to appear and to produce certain records and documents before F. L. Williamson, an Enforcement Attorney of the District of Columbia District Office, Office of Price Administration, at 5601 Connecticut Avenue, N. W., Washington, D. C. on the sixth day of August, 1945, at 10 o'clock A. M. Personal service was made on the second day of August, 1945, by delivery of the duplicate original subpoena, the original of which is attached hereto as Exhibit "A" and made a part hereof, to respondents as is shown by the return of service on said original of the subpoena.

5. Respondents did not produce any of the documents described in the aforesaid subpoena at the time and place set forth in the subpoena and have not at any time produced documents in response to said subpoena, nor has any representative of the Administrator at any time since the issuance of the subpoena inspected any of the said documents.

6. All the documents required to be produced by the subpoena are now and were at the time of issuance of

the subpoena deemed by applicant to be relevant and material to the investigation undertaken by him.

7. On information and belief:

The documents required to be produced by the subpoena are now and at all times mentioned herein have been in the possession and control of respondents.

WHEREFORE, the applicant Chester Bowles, Administrator, Office of Price Administration, respectfully prays that:

1. This Court order that upon a day certain to be fixed in such order the respondent produce before F. L. Williamson, Enforcement Attorney, at such time and place as this Court may order, the documents described in the subpoena duces tecum attached hereto as Exhibit "A".

2. The applicant have such other and further relief as may be necessary or appropriate.

CARL W. BERUEFFY,

District Enforcement

Attorney

Office of Price Administration

F. L. WILLIAMSON,

5601 Connecticut Avenue,

N. W.

Assistant Enforcement

Attorney

Office of Price Administration

4 In re: Raley
Misc. No. 152
Exhibit "A"

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
SUBPOENA DUCES TECUM

James G. Raley and Thomas E. Raley,
t/a Raley's Food Store
2331 Calvert Street, N. W.
Washington, D. C.

At the instance of the Price Administrator, Office of
Price Administration, you are hereby required to appear
before

F. L. Williamson, Enforcement Attorney
of the Office of Price Administration, at 5601 Connecticut
Avenue, N. W.
in the City of Washington, D.C.
on the 6th day of August, 1945, at 10 o'clock A. M.
of that day,

And you are hereby required to bring with you and
produce at said time and place the following documents:

All books, records and sales slips showing sales of com-
modities subject to price control between January 1, 1945,
and the date of this subpoena.

FAIL NOT AT YOUR PERIL

IN WITNESS WHEREOF, the undersigned,
District Director of the Office of
Price Administration, has hereunto set
his hand at Washington, D. C.
this 2nd day of August, 1945.

ROBERT K. THOMPSON,
District Director.

NOTICE TO WITNESS: If claim is made for witness fee or mileage, this subpoena should accompany voucher.

5 RETURN OF SERVICE

I certify that a duplicate original of the within subpoena was duly served*

- ☒ on the person named therein.
- ☐ by leaving the said original at the principal office or place of business of the person named therein, to wit, at:

on the 2 day of August 1945.

CHESTER C. STEPP
(Person making service)
Investigator OPA
(Title)

*Check method used.

6 *Amended Application for an Order to Produce
Records in Compliance with a Subpoena Issued
by the Office of Price Administration*

5. Respondents failed and refused to produce any and all of the documents directed in the aforesaid subpoena at the time and place set forth in the subpoena and have not at any time produced documents in response to said subpoena, nor has any representative of the Administrator at any time since the issuance of the subpoena inspected any of the said documents.

7
CARL W. BERUEFFY (s)
Carl W. Berueffy,
District Enforcement Attorney

J. GRAHAME WALKER (s)
J. Grahame Walker,
Assistant Enforcement Attorney

F. L. WILLIAMSON (s)
F. L. Williamson,
Assistant Enforcement Attorney

Attorneys for Plaintiff

DISTRICT OF COLUMBIA, ss:

F. L. WILLIAMSON, being first duly sworn, on oath deposes and says: that he has read the foregoing application and knows the contents thereof; that the matters and facts therein set forth as upon personal knowledge are true and those set forth upon information and belief he verily believes to be true.

F. L. WILLIAMSON (s)
F. L. Williamson,

Subscribed and sworn to before me
this 18th day of October 1945.

JOHN D. WOOD, JR.
Investigator—OPA

7
*Answer of Respondents to Application for
Order to Produce Records*

Now comes the respondents, James G. Raley and Thomas E. Raley, by their attorneys, Paul Flaherty and C. L. Dawson, and for answer to the Application for an

Order to Produce Records in Compliance with a Subpoena Issued by the Office of Price Administration, state as follows:

1. The respondents admit the allegations of paragraph 1 of said Application; they neither admit nor deny the allegations of paragraph 2 thereof but demand strict proof thereof; they allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of said Application; respondents deny the allegation of paragraph 4 of said Application to the effect that the subpoena in question was issued by the applicant, Chester Bowles, Administrator, Office of Price Administration, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegation respecting the return of service of the subpoena mentioned in Paragraph 4; answering paragraph 5 of said Application, respondents state that they appeared by attorney in response to said subpoena and fully apprised the local Office of Price Administration of their grounds and reasons for not complying with the same, all of which appears more fully hereinbelow; the respondents allege that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6 of the Application; answering paragraph 7 of said Application, respondents state that said subpoena does not mention or designate any specific documents, and therefore they can neither admit nor deny that they have possession or control thereof.

2. The subpoena upon which the application is based is invalid and of no effect, because it was signed and issued by the District Director and not by the Administrator as required by law.

3. The subpoena is contrary to the provisions of the Constitution of the United States prohibiting unreason-

able search and seizure in that it does not specify
8 or designate any particular documents, records, or
papers to be produced, but indiscriminately calls for
the entire records of respondents.

4. The subpoena is too broad and sweeping and is not
coextensive with the protection afforded by the Fourth
and Fifth Amendments to the Constitution of the United
States, since it might enable applicant to obtain and use
privileged evidence without revealing its source.

5. The subpoena, if enforced as it stands, would be con-
trary to the provisions of due process, as it would deprive
respondents of their only evidence of debts due to them
or place unreasonable burdens on them of duplicating their
entire records.

6. The application for an order to produce records
herein fails to state sufficient facts upon which relief can be
granted.

7. The subpoena does not properly identify the papers
and documents sought to be produced, and is otherwise
unreasonable, oppressive, confiscatory, and invalid.

Wherefore, respondents pray:

1. That the original and amended Application for an
Order to Produce Records in Compliance with a Subpoena
Issued by the Office of Price Administration be dismissed
with prejudice.

2. For such other and further relief as to the Court
may seem just and proper.

PAUL FLAHERTY (s)

C. L. DAWSON (s)

Paul Flaherty and C. L.
Dawson,

Attorneys for Respondents,

Suite 200,
923 15th St., N. W.,
Washington 5, D. C.
Tel.: NAtl. 6846.

Copy received the 8 day of November, 1945:

CARL W. BERUEFFY (s)
Attorney for Applicant.

*Affidavit in Opposition to Application for Order
to Produce Records*

9

District of Columbia, ss:

James G. Raley, being duly sworn, says that he and his brother, Thomas E. Raley, are named as respondents herein and that they conduct a retail grocery and provision store as partners at 2331 Calvert Street, N. W., Washington, D. C.; that the subpoena issued by the Office of Price Administration of the District of Columbia, calling for "All books, records, and sales slips showing sales of commodities subject to price control . . ." in effect demanded their entire current business records; that the respondents cannot conduct their business in the absence of all such records; that the sales slips consist of thousands of loose, individual credit account and delivery slips, which are kept in a file under customers' names, and which comprise the only evidence which the respondents have of deliveries and indebtedness of charge customers; that such customer files cover the current accounts of several hundred charge customers and represent thousands of dollars of charge accounts and unpaid deliveries owed to the respondents; that said files or accounts are constantly referred to and worked on by the respondents during the course of each day's business; that if these current accounts were to be removed from respondents files it would be impossible to

settle accounts of customers, proper charges could not be made, the thousands of loose slips could not be duplicated if lost or misplaced, and the respondents would be unable to collect such accounts, thereby sustaining great financial losses; that if after a blanket inspection of their files a current account were paid up, there would be no way of telling whether evidence was obtained from such records as a result of any such investigation; the respondents have at all times complied with the law and regulations pertaining to price control and have ever been and are now willing to cooperate with the local Office of Price Administration within reason, but they state that the subpoena in question is arbitrary, oppressive, unreasonable, and invalid, and violates the rights, privileges and immunities guaranteed to them by the Fourth and Fifth Amendments to the Constitution of the United States.

JAMES G. RALEY (s)
James G. Raley.

PAUL FLAHERTY. (s)
Paul Flaherty,
Attorney for Respondents,

Suite 200,
923 15th St., N. W.
Washington 5, D. C.
Tel.: NATl. 6846.

SUBSCRIBED AND sworn to before me this 7th day of November, 1945.

JOSEPH E. DEUPREE (s)
Notary Public, D. C.

(SEAL)

My Commission Expires
July 31, 1947

42 Why can't you reach a practical solution of the problem?

MR. FLAHERTY. I think, your Honor, there are many difficulties about their coming in and inspecting the entire records.

THE COURT: How else could they reduce it to what is reasonable?

MR. FLAHERTY. I would suggest this, that if they want to look at any particular accounts, let them give the names of the customers or the accounts, and we would be glad to give that to them.

THE COURT: I don't know that they know which ones they want. It is a fishing expedition, I suppose; but I suppose to some extent fishing expeditions under the OPA have been given sanction.

MR. FLAHERTY. The Supreme Court hasn't
43 sanctioned it under *Hale versus Henkel*, at 201 U. S.
43, and I think this is more sweeping than under *Hale versus Henkel*.

THE COURT. We had the OPA in the middle of the war.

MR. FLAHERTY. But the Constitutional guarantees, nevertheless, are not suspended.

THE COURT. I know.

MR. FLAHERTY. And that is just as good a law now as it was then, because we have the same Constitution, your Honor.

Federal Trade Commission against American Tobacco Company, 264 U. S. 303, affirmed the ruling in *Hale against Henkel* and even went further; and I might quote the opinion of Mr. Justice Holmes, except that I have it already in my points and authorities filed.

THE COURT. Is your office in a position to do any selection at all, Mr. Walker?

MR. WALKER. No, your Honor.

THE COURT. Why not?

MR. WALKER. You see, these records are records required to be kept by the regulation—

MR. FLAHERTY. Oh no they are not.

MR. WALKER. And the Administrator is entitled to examine them, as we see it. We have reason to believe there are sales that are in violation of the Act, and under those circumstances we are entitled to make an investigation, and we can't possibly determine in advance to whom those sales were made.

44 If it would help counsel or help the respondents, we would be glad to go in and pick up invoices for just a week at a time, photostat them, and bring them back the next day. We will do anything to help; but we do insist on our rights to the records.

*Order Enforcing Compliance with Subpoena
Duces Tecum*

47

This matter came before the Court upon the verified application of Chester Bowles, Administrator of the Office of Price Administration, for an order compelling compliance with the subpoena duces tecum issued by the Office of Price Administration, and it was argued by Counsel, and it appearing to the Court that said subpoena was regularly and properly issued and served in accordance with the provisions of the Emergency Price Control Act of 1942, as amended, and that respondents have refused to obey said subpoena and it further appearing that this Court has jurisdiction to issue an order requiring obedience to said subpoena, it is by the Court this 19th day of November 1945,

ADJUDGED, ORDERED and DECREED that the respondents, James G. Raley and Thomas E. Raley, be and

they hereby are directed to appear before F. L. Williamson, Assistant Enforcement Attorney of the Office of Price Administration at 5601 Connecticut Avenue, N. W., in the District of Columbia, on the 27th day of November 1945 at 10 o'clock A. M., and shall at that time produce for inspection by said F. L. Williamson any, and all records and documents mentioned in the aforesaid subpoena.

H. A. SCHWEINHOUT
Justice.

Seen:
PAUL FLAHERTY,
Attorney for Respondents.

[fol. 15] IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

Before Honorable D. Lawrence Groner, Chief Justice;
Henry W. Edgerton and Bennett Champ Clark, Associate
Justices

No. 9171, January Term, 1946

JAMES G. RALEY, et al., Trading, &c., Appellants,

vs.

CHESTER BOWLES, Administrator of the Office of Price
Administration, Appellee

MINUTE ENTRY—March 27, 1946

Argument commenced by Mr. Paul Flaherty, attorney
for appellants, continued by Mr. Milton Klein, attorney
for appellee, and concluded by Mr. Paul Flaherty. Appel-
lant allowed to file certain citations within forty-eight hours
and Appellee allowed to file some legislative history regard-
ing Congressional appropriation within forty-eight hours.

[fol. 16] IN UNITED STATES COURT OF APPEALS, DISTRICT OF
COLUMBIA

No. 9171

JAMES G. RALEY and THOMAS E. RALEY, Partners, t/a
Raley's Food Store, Appellants,

v.

PAUL A. PORTER, Administrator, O. P. A., Appellee

Appeal from the District Court of the United States for the
District of Columbia

Argued March 27, 1946. Decided June 17, 1946

Mr. Paul Flaherty, with whom Mr. C. L. Dawson was on
the brief, for appellants.

Mr. Milton Klein, Director, Litigation Division, with
whom Messrs. Samuel Mermin, Chief, Special Litigation

Branch, and J. Grahame Walker, District Enforcement Attorney, all of the Office of Price Administration, were on the brief, for appellee. Mr. David London, Chief, Appellate Branch, O. P. A., also entered an appearance for appellee.

Before Groner, C. J., and Edgerton and Clark, JJ.

OPINION—Filed June 17, 1946

EDGERTON, J.:

Appellants operate a retail grocery store in Washington, D. C. The District Director of the Office of Price Administration by virtue of authority which the Administrator had delegated to district directors,¹ issued on August 2, 1945 a 5191.

subpena directing appellants to produce "all books, records and sale slips showing sales of commodities subject to price control between January 1, 1945, and the date of this subpena". Appellants refused to comply and the District Court ordered them to do so. This appeal is from the court's order.

Section 202 (a) of the Emergency Price Control Act of 1942² authorizes the Administrator to make investigations, conduct hearings, and obtain information to assist him in enforcing the Act. Section 202 (b) authorizes him to require dealers, etc., to furnish information and permit inspection of records. It also authorizes him to administer oaths and, by subpena, to require persons to testify or produce documents or both. Appellants contend that the Administrator cannot delegate his power to issue subpoenas.

[fol. 17] Every function of the Office of Price Administration is conferred, in terms, upon the Administrator. Obviously he must delegate most of his functions if they are to be performed at all. Section 201 (a) authorizes him to "appoint such employees as he deems necessary in order to carry out his functions and duties under this Act". The Senate Committee on Banking and Currency, in reporting out the Price Control Bill, said that the Administrator might delegate "any of the powers given to him by the

¹ Revised General Order 53, issued May 13, 1944, 9 F. R.

² 56 Stat. 23, 30, amended, 58 Stat. 632, 637; 50 U. S. C. App. § 922 (a).

bill".³ His authority to delegate the fixing of maximum rents was upheld in *Bowles v. Griffin*, 151 F. 2d 458 (CCA 5), and was applied without question in *Bowles v. Willingham*, 321 U. S. 503. His authority to delegate the bringing of damage suits was upheld in *Bowles v. Wheeler*, 152 F. 2d 34 (CCA 9).⁴ There is no reason why the issuing of a subpoena, which is not enforceable without a court order, should not likewise be capable of delegation. The Administrator cannot exercise personal discretion every time the question arises whether a subpoena should be issued in connection with any of the thousands of investigations which his subordinates must carry on in all parts of the country. To hold that he may not delegate his subpoena power would mean that he must keep all his branch offices supplied with blank subpoenas signed by him in advance. It is more prudent and orderly for subpoenas to be signed by the selected representatives who must exercise the discretion which their use involves. The difference between the one system and the other is like that between signing hundreds of blank checks for future use and authorizing selected representatives to sign checks from time to time. Congress did not forbid the more orderly practice which the Administrator adopted. The Court of Appeals of the Seventh Circuit has reached the same conclusion.⁵

Cudahy Packing Company v. Holland, 315 U. S. 357, on which appellants rely, does not support their position. The Supreme Court there held that Congress had not authorized the Wage and Hour Administrator to delegate his subpoena power, but the Court based that conclusion chiefly on three considerations none of which is present here. (1) The statute there involved, the Fair Labor Standards Act, expressly authorizes delegation of the power to make investigations, but does not expressly authorize delegation of the power to issue subpoenas. The Price Control Act, on the other hand, does not expressly authorize delegation of any

³ S. Rep. No. 931, 77th Cong., 2nd Sess., p. 20.

⁴ Cert. den. December 10, 1945.

⁵ *Pinkus v. Porter*, — F. 2d — (C. C. A. 7), May 2, 1946. *Bowles v. Abendroth*, — F. Supp. —, D. C., Dist. Oregon, February 11, 1946, is in our opinion erroneous.

power of the Administrator.⁶ (2) The Fair Labor Standards Act adopts, by reference, the subpoena provisions of the Federal Trade Commission Act. That Act impliedly negatives the delegation of the subpoena power to subordinates, by providing that any *member* of the Trade Commission, as well as the Commission itself, may issue subpoenas. (3) The legislative history of the Fair Labor Standards Act tends to negative delegation, whereas that of the Emergency Price Control Act tends to support delegation.⁷

⁶ Appropriation Acts contain the following proviso: "That any employee of the Office of Price Administration is authorized and empowered, when designated for the purpose by the head of the agency, to administer to or take from any person an oath, affirmation, or affidavit when such instrument is required in connection with the performance of the functions or activities of said Office". National War Agencies Appropriation Act, 1944, 57 Stat. 522, 526; Second Deficiency Appropriation Act, 1944, 58 Stat. 597, 601. But this proviso, as the Committee on Revision of the Laws duly noted in incorporating it in the Code as § 922a of Title 50, was not enacted as a part of the Price Control Act. Moreover this proviso was not enacted to authorize the Administrator to delegate a power which the Price Control Act conferred upon him. On the contrary, it was enacted to authorize designated employees to exercise a power which the Price Control Act did not confer upon anyone and which the proviso itself did not confer upon the Administrator. The Act gives the Administrator power to administer oaths, but only in connection with the investigative powers granted by § 202. The Administrator concluded that only notaries, or other officers who derived their authority from some independent source, could administer to new employees the oath of office required by 5 U. S. C. §§ 16, 18. This was burdensome because of the vast number of the Administrator's employees, who include all the employees of local price and rationing boards. The proviso in the Appropriation Acts was inserted, at his request, in order to make it possible for his subordinates to swear in new employees. Hearings on National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., Part 2, pp. 306-307.

⁷ *Supra* at note 3.

Appellants contend that the subpoena was invalid because of its breadth, and because the Administrator did not show probable cause to believe that appellants were violating the Price Control Act. This position is untenable in the light of *Oklahoma Press Publishing Co. v. Walling* and *News Printing Co. Inc. v. Walling*, 66 S. Ct. 494, decided February 11, 1946, and *Cudmore v. Bowles*, 79 U. S. App. D. C. 255, 145 F. 2d 697. Appellants' assertion that examination of their records will disrupt their business, because they must constantly use the records, cannot be taken seriously. Counsel for the Administrator assured the trial court that if it would help appellants he was ready to pick up only a week's invoices at a time, photostat them, and return them the next day. No greater concession to appellants' convenience could fairly be asked.

Affirmed.

[fol. 19] IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA, APRIL TERM, 1946

No. 9171

JAMES G. RALEY and THOMAS E. RALEY, Partners Trading,
&c., Appellants,

VS.

PAUL A. PORTER, Administrator of the Office of Price
Administration, Appellee

Appeal from the District Court of the United States for the
District of Columbia

Before Groner, C. J., and Edgerton and Clark, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Clark.

Dated June 17, 1946.

[fol. 20] IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed August 15, 1946

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellants' brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Paul Flaherty, Attorney for Appellants, Suite 200,
923—15th Street, N. W., Washington, D. C., Tel.:
NAtl. 6846.

Copy of the foregoing mailed to J. Grahame Walker, Esquire, attorney for appellee, 5601 Connecticut Avenue, N. W., Washington, D. C., the 14 day of August, 1946.

Paul Flaherty, Attorney for Appellants.

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1946

No. 512

ORDER ALLOWING CERTIORARI—Filed November 12, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, limited to the question whether the Emergency Price Control Act authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas.

The case is transferred to the summary docket and assigned for argument immediately following No. 483.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8768)

FILE COPY

IN THE
Supreme Court of the United States

October Term, 1946

Nó. 512

JAMES G. RALEY, AND THOMAS E. RALEY, TRADING AS
RALEY'S FOOD STORE
Petitioners,

vs.

PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE OF
PRICE ADMINISTRATION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

PAUL FLAHERTY,
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923 15th Street N. W.
Washington, D. C.

*Attorneys for the
Petitioners.*

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IN THE
Supreme Court of the United States

October Term, 1946

No. _____

JAMES G. RALEY, AND THOMAS E. RALEY, TRADING AS
RALEY'S FOOD STORE
Petitioners,

VS.

PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE OF
PRICE ADMINISTRATION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

*To the Honorable, Chief Justice, and the Associate Justices
of the Supreme Court of the United States.*

The petitioners, and the appellants below, pray that a
writ of certiorari issue to review the judgment of the

United States Court of Appeals for the District of Columbia entered in the above cause on June 17, 1946 (R. 19).

OPINIONS BELOW

The District Court of the United States for the District of Columbia did not render an opinion in this cause. The opinion of the United States Court of Appeals for the District of Columbia is set forth on pages 16, 17, and 18 of the record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 17, 1946 (R. 19). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This case involved two questions. First, whether the Administrator of the Office of Price Administration may lawfully delegate his power to issue subpoenas to a District Director of the Office of Price Administration under the Emergency Price Control Act of 1942, as amended. Second, whether the subpoena issued was too broad and sweeping as to be invalid and to constitute in law an unreasonable search and seizure within the meaning of the Fourth and Fifth Amendments to the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes are hereinafter discussed in the argument, and are also set out fully in the Appendix to this argument and brief.

STATEMENT OF THE FACTS

The petitioners are engaged in the retail grocery and provision business in the District of Columbia, trading under the firm name and style of Raley's Food Store. The respondent is the Administrator of the Office of Price Administration. On August 2, 1945, the petitioners were served with a subpoena duces tecum signed by Robert K. Thompson, District Manager, of the Office of Price Administration, requiring the petitioners to appear before one F. L. Williamson, Enforcement Attorney, of the Office of Price Administration on August 6, 1945, at 10 o'clock A.M. and bring with them "all books, records and sales slips showing sales of commodities subject to price control between January 1, 1945, and the date of this subpoena." (R. 5). The record shows that at the time and place specified in the subpoena, the petitioners appeared by counsel and objected to the subpoena and fully apprised the local Office of Price Administration of their reasons and grounds for not complying with such subpoena. (R. 8). The grounds are set forth at length on page 9 of the Joint Appendix.

The official of the local Office of Price Administration before whom the subpoena was returnable refused to consider the grounds of petitioners' objections to the subpoena duces tecum, and the local Office of Price Administration subsequently filed an application in the District Court of the United States for the District of Columbia in the name of Chester Bowles, Administrator of the Office of Price Administration, for an order to compel the petitioners to

comply with the above-mentioned subpoena duces tecum, (R. 1-2-3-4). The application for such an order was signed by Carl W. Berueffy, District Enforcement Attorney and F. L. Williamson, Assistant Enforcement Attorney. None of the papers filed in connection with the application described above was signed by Chester Bowles, Administrator of the Office of Price Administration.

The petitioners duly filed their answer to the foregoing application. (R. 7-8-9). The answer alleged among other things that the petitioners had not responded to the subpoena originally for reasons stated, that the subpoena was invalid in that it was not signed by any person authorized by law to sign and issue such a subpoena, that the subpoena did not designate any specific documents, papers, or records, that the subpoena was too broad and sweeping and was not coextensive with the protection afforded by the Fourth and Fifth Amendments to the Constitution of the United States, that the subpoena was unreasonable, oppressive, confiscatory, and invalid, and that the subpoena was void on other grounds stated in the answer. (R. 8-9).

The affidavit of James G. Raley (R. 10-11) sets forth the fact that if the petitioners were to produce the records called for by this blanket subpoena, which records constituted their entire working records, they could not conduct their business, that the bulk of such records consisted of thousands of charge slips of several hundred customers and represented thousands of dollars owed the petitioners of which these slips were their only evidence of indebtedness. The affidavit mentioned above further stated that the loose sales slips could not be duplicated and if lost or misplaced would result in irreparable damage and great financial loss to the petitioners, that the petitioners could not comply with the blanket subpoena and continue to properly conduct their business, and that the petitioners had never violated any of the regulations of the Office of

Price Administration and had otherwise complied with the law regulating prices.

The statement of counsel for the respondent at the time of the hearing on the application for an order to compel compliance with the aforesaid subpoena is important to the determination of the questions arising on this appeal. (R. 12). It shows that the District officers of the Office of Price Administration had before them no evidence whatsoever that the petitioners had violated any law or regulation relating to price control or that such officials had any reason to believe that such was the case, but that on the contrary the demand made by the subpoena in question was merely a "fishing expedition" and was based purely on vague suspicion, if anything. In fact the record shows this by the following colloquy. (R. 12). Mr. Flaherty. "I would suggest this, that if they want to look at any particular accounts, let them give the names of the customers or the accounts, and we would be glad to give that to them." The Court. "I don't know that they know which ones they want. It is a fishing expedition, I suppose; but I suppose to some extent fishing expeditions under the OPA have been given sanction." The court subsequently inquired of counsel for the respondent as follows. (R. 12). The Court. "Is your office in a position to do any selection at all, Mr. Walker?" Mr. Walker. "No, your Honor."

The court below granted the application of the respondent and ordered the petitioners to appear on November 27, 1945 at 10 o'clock, A.M. and produce records as directed in the before-mentioned subpoena. For the information of this Court, a subsequent order was duly entered by the District Court staying the aforesaid order for compliance pending the final disposition of the instant appeal.

The United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court.

SPECIFICATIONS OF THE ERRORS TO BE URGED

That the United States Court of Appeals for the District of Columbia erred in its ruling that the Administrator of the Office of Price Administration had authority to delegate his power to issue subpoena, and that the Court further erred in holding that the subpoena was not void because it was too broad and sweeping and as such constituted an unreasonable search and seizure under the Fourth and Fifth Amendments to the Constitution of the United States:

REASONS FOR GRANTING THE WRIT

The petitioners assert that a writ of certiorari should be granted in this cause under subdivision 5 of Rule 38 of this Honorable Court because the United States Court of Appeals for the District of Columbia has rendered a decision in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit on the same matter; that is to say that the United States Court of Appeals for the District of Columbia has held in its opinion in this cause that the Administrator of the Office of Price Administration has full power and authority to delegate the power to issue subpoenas, while the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Paul Porter, Price Administrator v Mohawk Wrecking & Lumber Company, a partnership, and Harry Smith*, decided August 12, 1946, expressly contradicted the opinion in the instant case and held upon consideration of the same statutes and regulations involved here that no such authority to delegate the power to issue subpoena existed. It is further asserted that the decision of the United States Court of Appeals in the instant cause is in conflict with the applicable decisions of this Honorable Court namely, the case of *Cudhay Packing Company v. Holland* 315 U.S. 357, and that this Court in the exercise

of its supervision over the immediate Courts of Appeals should finally determine the questions of law involved in order to have uniformity of decisions throughout the United States. The decision of the United States Court of Appeals in the instant cause is also in conflict with the decisions of this Honorable Court relating to the broad and sweeping provisions of the subpoena, and the right to go on "fishing expeditions" all of which decisions will be mentioned in the argument and brief filed with this petition. The writ should be granted on both grounds set forth in the petition for the reasons herein stated.

ARGUMENT AND BRIEF

- I. **The applicable language of the Emergency Price Control Act is virtually identical with that of the act construed by the Supreme Court in *Cudahy Packing Co. v. Holland* as prohibiting delegation of the subpoena power by the Administrator.**

In *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895, the Supreme Court, in construing applicable sections of the Fair Labor Standards Act (29 U.S.C.A. secs. 204(a), (b), (c), 208(f), and 209) with interrelated parts of the Federal Trade Commission Act (15 U.S.C.A. secs. 41, 42, 43, and 49) incorporated by reference therein, determined that the Administrator of the Wage and Hour Division could not lawfully delegate the power of subpoena conferred on him by the first-mentioned act. This precise question, arising from cognate provisions of the Emergency Price Control Act (50 War Appendix U.S.C.A. secs. 921(a), (b), (d), and 922(b)), is in issue in the instant case, in which the United States Court of Appeals for the District of Columbia held adversely to the petitioners that the Administrator of the Office of Price Administration may delegate the subpoena power under the last-mentioned act, which decision, however, was

expressly repudiated by the United States Circuit Court of Appeals for the Sixth Circuit in *Porter v. Mohawk Wrecking & Lumber Co.*, F.2d, (decided Aug. 12, 1946). For convenience of reference and comparison the statutory provisions mentioned above are shown in a parallel table in the Appendix to this brief.

A comparison of the applicable sections of each of the aforesaid acts, as shown in the Appendix herein, shows beyond question that the respective statutes in respect to the subpoena power are essentially the same. Thus, in *Porter v. Mohawk Wrecking & Lumber Co.*, *supra*, the court said at pg. 8 of the opinion:

“... that the Supreme Court in the *Cudahy* case had before it the same language and the same question [as in the instant case under the Emergency Price Control Act] and held that the statutory authority to delegate ‘his functions and duties’ under the Act did not include the authority [of the Administrator] to delegate the subpoena power.”

In the report of the hearing before the Committee of the House of Representatives to Investigate Executive Agencies, held June 22, 1944, Mr. Aaron L. Ford, General Counsel to the Committee, stated that the exact language of the Emergency Price Control Act appeared in the parts of the Fair Labor Standards Act upon which the Supreme Court based its decision in the *Cudahy* case. In 2 Pike & Fisher Administrative Law, Current Text, p. 44 C 16-5, it is also said, “The Emergency Price Control Act of 1942 falls squarely within the rule of the *Cudahy* case.” Accord, In the matter of Wm. J. Shields, et al., memorandum opinion by Beaumont, J., (U.S. Dist. Judge, So. Dist. Calif.), May 4, 1946, F.Supp.

An open-minded perusal of the related statutes described above should convince every layman that they are one in substance and intent, and are as well almost identical in words and form. Accordingly, where a statute, such as

the Fair Labor Standards Act, has been construed by the court of last resort, as in *Cudahy Packing Co. v. Holland*, *supra*, and a similar or cognate statute, such as the Emergency Price Control Act as here involved, is subsequently reenacted in the same or substantially the same terms, it is presumed that Congress in so doing was familiar with such judicial construction and adopted the same as a part of the law. *Heald v. District of Columbia*, 254 U.S. 20, 41 S.Ct. 42, 65 L.Ed. 106; *Bruce v. Tobin*, 245 U.S. 18, 38 S.Ct. 7, 62 L.Ed. 123; *U.S. v. Carecedo Hermanos Y Compania*, 209 U.S. 337, 28 S.Ct. 532, 52 L.Ed. 821; *Latimer v. U.S.*, 223 U.S. 501, 32 S.Ct. 242, 56 L.Ed. 526; *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 53 S.Ct. 721, 77 L.Ed. 1331.

In *Porter v. Mohawk Wrecking & Lumber Co.*, *supra*, the court said in this regard:

"As pointed out above, shortly after the enactment of the Price Control Act the Supreme Court in the *Cudahy* case construed unfavorably to the Administrator's contention the statutory language now under consideration. With that interpretation *definitely* before it, Congress subsequently reenacted the Act of June 30, 1944 and June 30, 1945 without attempting to amend the language so as to give it a different meaning and effect." (Italics supplied).

II. The rule laid down by the Supreme Court in *Cudahy Packing Co. v. Holland* to the effect that the power to subpoena may not be delegated without express statutory authority is applicable to the instant case, and the Court of Appeals erred in not recognizing this principle.

Prescinding from and disregarding momentarily the concept of identity of language of the subpoena provisions in the Emergency Price Control Act and the Fair Labor Standards Act as construed by the Supreme Court in *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895, which was discussed in the preceding para-

graphs herein, this Court in the *Cudahy* case laid down the broad principle of administrative law that a head of an administrative agency may not delegate the subpoena power conferred on him by statute, unless he is expressly so authorized by such act. Regardless of any slight variance in the form of wording of the respective statutes, otherwise similar in substance, the principle as enunciated by the Supreme Court denying the right of the Administrator to delegate the power of subpoena without express statutory authorization is unquestionably applicable in the case at hand.

In the *Cudahy Packing Company* case, the Supreme Court, speaking through the late Chief Justice Stone, stated the rule as follows:

"The entire history of the legislation controlling the use of subpoenas by Administrative Officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."

Speaking in similar vein, the Court restated and reaffirmed the rule in the same case (*Cudahy* case, 315 U.S. 357, 364) in the following words:

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted."

See also, *National Labor Relations Board v. Barrett Co.*, (1941, CCA 7), 120 F.2d 583, 586..

In deciding the petitioners' case below, the Court of Appeals failed to recognize this fundamental principle. That there is no express provision for delegation of the subpoena power in the Emergency Price Control Act is readily apparent from even a cursory examination of the applicable sections of the act, as will be discussed more fully hereinafter. On the contrary, the plain intent of Congress as expressed in such act is to positively inhibit such delegation, as will be clearly demonstrated herein.

below in the discussion in this connection of sections 922(b) and 922a of Title 50 War Appendix U.S.C.A. In deciding the question of authority to delegate the subpoena power, the Sixth Circuit Court of Appeals, in *Porter v. Mohawk Wrecking & Lumber Co.*, _____ F.2d _____, decided Aug. 12, 1946, at pg. 9 of the opinion, held that the rule in the *Cudahy* case applied to the Emergency Price Control Act as a general principle of law laid down by our highest Court, and flatly stated that the United States Court of Appeals for the District of Columbia in the instant case had failed to grasp the point of the Supreme Court's decision in the *Cudahy* case. In *Porter v. Mohawk Wrecking & Lumber Co.*, *supra*, the court said in this regard:

"The Administrator [of the Office of Price Administration] refers us to the four following opinions of different Circuit Courts of Appeals, all involving the same issue as is now presented to us and sustaining his contentions: *Pinkus and Segal v. Porter*, decided May 24, 1946, 155 Fed. (2d) 90, 7th Circuit; *Raley v. Porter*, decided June 17, 1946, _____ Fed. (2d) _____, U.S. Circuit Court of Appeals District of Columbia; *Porter v. Gantner & Mattern Company*, decided June 24, 1946 _____ Fed. (2d) _____, 9th Circuit; *Porter v. Murray*, decided June 28, 1946, _____ Fed. (2d) _____, 1st Circuit. We recognize the weight of those opinions. It is sufficient to say here that they hold that the decision of the Supreme Court in the *Cudahy Packing Company* case is not controlling due to the differentiating features involved in the Emergency Price Control Act, as contended for by the Administrator and as pointed out hereinabove. In our view that the ruling in the *Cudahy Packing Company* case does control the present situation, we necessarily have to disagree. We fail to find in any of the four opinions referred to any real recognition of the broad rule of administrative law pronounced by the opinion in that case, namely, that the subpoena power conferred by legislation upon the head of an administrative agency is delegable by him 'only when an authority to delegate is expressly

granted.' As stated above, we believe that fundamental rule controls our decision in the present case."

So also, in 2 Pike & Fisher Administrative Law, Current Text, p. 44 C-16-5, it is stated:

"The Emergency Price Control Act of 1942 falls squarely within the rule of the *Cudahy* case."

The dominant reason for the rule as expressed by the Supreme Court in the *Cudahy* case (315 U.S. 351, 363-364) is that such unlimited authority of an administrative officer to delegate the power of subpoena "is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer." Hence, there is an impelling reason for granting such drastic power to subpoena "only to the responsible head of the agency."

III. The provisions of the Emergency Price Control Act regarding subpoenas and subsequent amendment thereof express in unmistakable terms that the subpoena power is reposed in the Administrator solely.

The provisions of the Emergency Price Control Act pertaining to subpoenas which are involved herein are contained in 50 U.S.C.A. War Appendix, sec. 922(b), Jan. 30, 1942, c. 26 Title 11, sec. 202, 56 Stat. 30, as amended June 30, 1944, c. 325, Title I, sec. 105, 58 Stat. 637, and read as follows:

"§922 (b). The Administrator is further authorized, *by regulation or order*, to require any person who is engaged in the business of dealing with any commodity or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-

area accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place." (Italics supplied).

It was seen hereinabove that under the rule of *Cudahy Packing Co. v. Hofland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895, the subpoena power conferred by statute upon an administrative officer may not be delegated by him without express authority to do so prescribed by the statute. In the instant case, the applicable statutory provisions for issuing subpoenas, quoted above, not only do not authorize the Administrator of the Office of Price Administration either expressly or by inference to delegate such subpoena power, but that section (50 U.S.C.A. War App. sec. 922(b)) on the contrary limits the power of subpoena by necessary implication to the Administrator exclusively.

Section 922(b), above, may be said to consist of two parts, consisting of two sentences, the first of which provides in effect for conducting hearings and investigations, and the like, under the act, while the second part or sentence provides for the subpoena power under the act. It will be observed that in the first part or sentence of section 922(b), the Administrator is authorized to conduct hearings, investigations, and the like, and that he is further expressly authorized therein to delegate this power of investigation and the like by the inclusion in the grant of such power of the phrase "by regulation or order." This is admittedly an express authorization to delegate the power of investigation and inquiry, as this part of section 922(b) specifies the only practicable method of delegation, namely, by means of regulations or orders.

The second part or sentence of section 922(b) confers the power of subpoena on the Administrator only, and does not contain any words or provisions whatsoever for del-

egation of the subpoena power, as does the first part or sentence of section 922(b) with respect to investigations. In the construction of a section of a statute, such as section 922(b), above, the section must be read as a whole and its intent gathered from all its provisions. *Herder v. Helvesting*, 70 App. D. C. 287, 106 F 2d 153, cert. den. 308 U.S. 617, 60 S.Ct. 262, 84 L.Ed. 515; rehearing den. 308 U.S. 639, 60 S.Ct. 377, 84 L.Ed. 530; *Garfield v. U. S. ex rel. Goldsby*, 30 App. D. C. 177, affirmed, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168.

If Congress intended to allow delegation of the subpoena power, it would not have differentiated between the two powers in the same section, by expressly allowing delegation of investigation powers but not including subpoena powers.

Nothing could be clearer than the expression of the language of section 922(b), quoted above, definitely authorizing the Administrator to delegate the investigatory powers but conferring the subpoena power exclusively on the Administrator without power to delegate. In the *Cudahy* case (315 U.S. 357), the Supreme Court in just such a situation declared that the meaning of such statutory provisions is perfectly plain and that in short it precludes the delegation of the subpoena power by the Administrator. In giving effect to the rule, the Supreme Court (*Cudahy* case, 315 U.S. 357) said at pg. 364:

"Because of these differences it seems to us fairly inferable that the grant of authority to delegate the power of inspection and the omission of authority to delegate the subpoena power show a legislative intention to withhold the latter. Moreover, if a subpoena power in the regional directors were to be implied from their delegated authority to investigate, we should have to say that Congress had no occasion expressly to grant the subpoena power to the Administrator, who also has the power to investigate, and that this grant to him was superfluous and without meaning or purpose."

The primary rule of statutory construction is that the intent of the Legislature is to be found in the language it has used, and where that language is clear, as in the case of section 922(b), above, it is not for the court to say that the section (e.g. sec. 922(b)) shall be construed to embrace a grant of authority (such as to delegate subpoena power) not specifically included in the statute. In other words, the court cannot supply omissions in legislation, especially in the case of section 922(b) in view of the *Cudahy* decision, nor afford relief because omissions exist. *U.S. v. Union Pac. R. Co.*, 91 U.S. 72, 23 L.Ed. 224; *Ohio Nat'l Bank v. Berlin*, 26 App.D.C. 218; see also, *Cudahy Packing Co. v. Holland*, loc. cit. *supra*.

To further quote from *Cudahy Packing Co. v. Holland*, *supra*:

"The construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the act has in terms given only to him, can hardly be accepted unless plainly required by its words."

The fact that Congress intended to restrict the subpoena power to the Administrator under the Emergency Price Control Act is further indicated by the passage of an amendment to the original act of January 30, 1942. This amendment was included in the Second Deficiency Appropriation Bill of June 30, 1944, but was repeated in the Price Control Act of July 5, 1945. It now comprises 50 U.S.C.A. War Appendix, sec. 922a (Note: this section is not to be confused with 50 U.S.C.A. War App. sec. 922(a)), and reads as follows:

"Any employee of the Office of Price Administration is authorized and empowered, when designated for the purpose by the head of the agency, to administer to or take from any person an oath, affirmation, or affidavit when such instrument is required in connection with the performance of the functions or activities of said office."

The respondent no doubt will protest that this was done to permit clerks employed in ration boards to take oaths in the manner of notaries public in connection with OPA activities. If the Administrator has the implied authority to delegate the puissant power of subpoena under the Price Control Act as the respondent contends, why was it necessary to amend the act to permit his subordinates to perform relatively insignificant acts of oath taking. It is, therefore, difficult to see how the respondent can bona fide maintain that the Administrator has the implied authority to delegate the subpoena power which is so cautiously conferred by the legislature and so jealously protected from unauthorized delegation by inference by the courts, when the respondent is confronted by the admission of the Office of Price Administration that the above amendment was procured by that office for the purpose of authorizing its clerks to take oaths, notwithstanding that the Administrator is empowered to administer oaths and affirmations under the act.

Surely, if the Office of Price Administration considered it necessary to amend the act to permit clerks to administer oaths as representatives of the Administrator, it must have known that it was necessary to a far greater extent to obtain an amendment to authorize the Administrator's representatives to issue subpoenas.

In this connection the following excerpts from the report of the testimony of Fleming James, Jr., Director of Litigation, OPA, at a hearing on June 22, 1944 before the House of Representatives Committee to Investigate Executive Agencies is of concern:

'Rep. Hartley: "... We have just finished a consideration of the Price Control Act extension. Hearings were held before the Banking and Currency Committee. Don't you think you would have been on much more solid ground and would have had far greater legal authority had you come before the Banking and

Currency Committee and suggested that this being necessary [i.e. an amendment authorizing delegation of subpoena power], you would like to have had it written into the extension of price control?"

"Mr. James: "I think this is true, sir: That there would be no doubt at all if Congress specifically gave that delegation as a result of that." "

- IV. The legislative history should not have been adverted to by the Court of Appeals since the provisions of the Act in question are not ambiguous, and are not uncertain in view of the Cudahy decision; and furthermore the legislative history if anything supports the petitioners contention rather than the respondent's.**

A legislative construction of a statute can be invoked only where the statute is ambiguous or doubtful. *Caminetti v. U.S.*, 242 U.S. 470, 37 S.Ct. 102, 61 L.Ed. 442, LRA 1917F 502, Ann. Cas. 1917 B 1168. The provisions of the statute relating to subpoenas involved in the instant case are neither ambiguous nor doubtful, as the words and meaning of the applicable sections are plain and their import is clear, especially in view of the decision in the *Cudahy* case. Much has been made of and probably will be made of the so-called "legislative history" by the respondent in this case. There is reason to believe that the court below was not fully advised as to the full context and import of the so-called "legislative history" submitted by the respondent. Notwithstanding, the true legislative history of the Act supports the petitioners' case and is in fact against that of the respondent.

Thus, the report of the session of the House Committee To Investigate Executive Agencies on June 22, 1944, in which the Director of Litigation of OPA testified, is replete with statements showing that Members of Congress were familiar with the effect of the *Cudahy* case on the

Price Control Act and felt that Congress was bound by the decision of the Supreme Court therein with respect to reenactment of that Act. At that hearing it was developed that the Office of Price Administration had for a period of more than two years complied with the ruling in the *Cudahy* case, but had subsequently disregarded that practice merely for purposes of expediency. See, *ad hoc*, pg. 7 of the opinion in *Porter v. Mohawk Wrecking & Lumber Co.*, (CCA 6), F.2d, (decided Aug. 12, 1946).

The following quotation from House Report 862, 78th Cong., 1st Sess., 2nd Intermediate Report pursuant to H. Res. 102, Page 16, is typical of the temper and attitude of Congress with respect to the OPA's disregard for legal forms and its abuse of statutory authority, including unlawful delegation of the subpoena powers:

"The committee finds that the OPA has assumed unauthorized powers to delegate by regulation and has by misinterpretation of Acts of Congress set up a nationwide system of judicial tribunals through which this executive agency judges the actions of American citizens relative to its regulations and orders and imposes drastic and unconstitutional penalties upon those citizens, depriving them in certain instances of vital rights and liberties without due process of law.

"The exercise of extraordinary executive powers in wartime when those powers are duly granted by the legislature is one thing. The assumption of such powers by executive agencies without any such grant by the legislature is quite another."

The dissenting opinion in *Cudahy Packing Co. v. Holland*, *supra*, concedes that the legislative history is not there controlling. *Porter v. Mohawk Wrecking & Lumber Co.*, *supra*. Ergo, it is not pertinent in the instant case since the Price Control Act and the *Cudahy* decision which governs it with respect to subpoena delegation are not ambiguous or subject of doubt. The fragment of the Senate Committee report seized upon by the respondent in

the case below and dwelt upon in *Pinkus and Segal v. Porter*, (CCA 7), 155 F.2d 90, is of no significance, and is disposed of quite handily by the court in *Porter v. Mohawk Wrecking & Lumber Co.*, *supra*, at pg. 6 of the opinion, as follows:

"The report of the Senate Committee on Banking and Currency in reporting out the Price Control Bill is entitled to consideration, but in view of the general language used therein and the fact that it is the report of only one of the two houses of Congress makes it merely one element to be considered among several and certainly not controlling. The report largely paraphrases §§201(a) and 201 (b) of the Act, refers to the "powers" of the Administrator only generally, and, as is the case in the wording of the Act itself, makes no specific mention of the subpoena power. In any event, the view of the Senate Committee as to the legal effect of the words used in the Act is directly contrary to the later view of the Supreme Court in the *Cudahy* case. The construction placed upon those words by the Supreme Court came only a few weeks after the enactment of the Emergency Price Control Act. Yet in the several reenactments of the Act in subsequent years, neither the Senate Committee on Banking and Currency nor Congress itself added anything to the statute to show that Congress, in passing the Act, had in mind an interpretation different from that given by the Supreme Court."

In this connection, it is established that in such matters, the courts are the final arbiters as to the proper construction of statutes. *U.S. v. Stafoff*, 260 U.S. 477, 43 S.Ct. 197, 67 L.Ed. 358. There is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. *U.S. v. American Trucking Ass'ns*, 310 U.S. 534, 543; *Helvering v. Hammel*, 311 U.S. 504, 510-511; *Browder v. U.S.*, 312 U.S. 335, 338; *Addison v. Holly Hill Co.*, 322 U.S. 607, 617-618. The Congress enacted the Price Control Act having subpoena provisions similar to those in the Fair Labor

Standards Act, (in fact, the former seems to have been patterned on and in most respects copied from the latter, as the parallel table of these acts in the Appendix herein discloses), and having in mind the rule implied in the split decision in *Holland v. Lowell Sun Co.*, 315 U.S. 784, 62 S.Ct. 793, 86 L.Ed. 1190 (affirming without opinion, *Lowell Sun Co. v. Fleming*, (CCA 1), 120 F.2d 213, 216), and later confirmed in *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895, acquiesced in the Supreme Court's decision by reenacting the Emergency Price Control Act several times since without altering the prohibition against delegation of the subpoena power under that act. Indeed, Congress has subsequently amended the Act in such a manner as to strengthen the rule in the *Cudahy* case as respects the last mentioned act, as was shown hereinbefore.

V. The Court of Appeals also erred in not holding that the subpoena duces tecum was so broad and sweeping as to constitute an unreasonable search and seizure within the meaning of the Fourth and Fifth Amendments.

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The subpoena duces tecum of the District Director of the Office of Price Administration, which is the subject of this petition, directed the appellants to produce "the following documents: All books, records and sales slips showing sales of commodities subject to price control be

tween January 1, 1945, and the date of this subpoena [August 2, 1945]." (R. 5).

Assuming *arguendo* that the subpoena signed and issued by the District Director instead of the Administrator is valid on its face, the subpoena is nevertheless contrary to the guarantee against unreasonable search and seizure of the Fourth and Fifth Amendments to the Constitution of the United States, because it is a blanket subpoena (R. 12) indiscriminately demanding in effect the production of petitioners' entire business records (R. 10-11). The respondent's attorneys admitted in open court that they were unable to specify any records in the subpoena and that there was no evidence of violations on which to base the subpoena (R. 12). "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." *Hale v. Hinkle*, 201 U.S. 43, 77, 26 S.Ct. 370 50 L.Ed. 652, 666. Subpoenas less sweeping than the one involved herein have been sharply condemned by the Supreme Court in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 700, 32 A.L.R. 786; *Hale v. Hinkle*, *supra*, and many others.

Mr. Justice Holmes, speaking for the Supreme Court in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305, 44 S.Ct. 336, 68 L.Ed. 700, 32 A.L.R. 786, said:

"Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 479, 38 L.Ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce

us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the commission's wholesale demand would cause, are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman v. Interstate Commerce Commission*, 211 U.S. 407, 53 L.Ed. 253, 29 Sup. Ct. Rep. 115; and as to correspondence, even in the case of a common carrier, in *United States v. Louisville & N. R. Co.*, 236 U.S. 318, 335, 59 L.Ed. 598, 606, P. U. R. 1915B, 247, 35 Sup. Ct. Rep. 363. . . ."

The petitioners, or anybody else in a similar position, are entitled to protection against indiscriminate use of blanket subpoenas of administration agencies. If this subpoena is upheld, petitioners would be at the mercy of petty officials and employees of the OPA who could if so minded harass and persecute the petitioners and others ceaselessly and maliciously at will. This is what petitioners would guard against by invoking the protection of their Constitutional rights and privileges.

This is no fanciful objection, as the following excerpt will show. House Report 862, 78th Cong., 1st Sess., 2nd Intermediate Report pursuant to H. Res. 102, Page 16, states:

"The OPA maintains a small army of enforcement attorneys, inspectors and investigators. Some of the methods used by this police force not only contravene statutory safeguards of private rights but even invade the field of immunity guaranteed by the Constitution against unlawful searches and seizures."

CONCLUSION

Wherefore, Petitioners pray that a writ of Certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Court of Appeals for the District of Columbia, and upon such review the judgment of said Court of Appeals for the District of Columbia be vacated, reversed, and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

PAUL FLAHERTY,
C. L. DAWSON,
Washington, D. C.

Attorneys for Petitioners.

APPENDIX

Statutes Involved In Argument

Sections are numbered as in U.S.C.A.

Emergency Price Control Act
Title 50, War Appendix-U.S.
C.A.

Sec. 921 (a). There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator. . . . The Administrator may, subject to the civil service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act. . . . The Administrator may utilize the services of Federal, State and Local agencies, and utilize such voluntary and uncompensated

Fair Labor Standards Act
Title 29, U.S.C.A.

Sec. 204(a). "There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division. . . .

(b). The Administrator may, subject to the civil service laws appoint such employees as he deems necessary to carry out his functions and duties under this chapter The Administrator may estab-

Federal Trade Commission
Act Title 15, U.S.C.A.

Sec. 41. "A Commission is created and established to be known as the Federal Trade Commission, etc.

Sec. 42. The Commission shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may, from time to time find necessary for the proper performance of its duties, etc.

services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court.

(b). The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator may, from time to time, issue such regulations and orders as he

lish and utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

Sec. 208—U.S.C.A. Par. (f)
"Orders issued under this section shall contain such

Sec. 43. The principal office of the Commission shall be in the City of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

may deem necessary or proper in order to carry out the purposes and provisions of this Act.

Sec. 922 (b). "The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

(e) "In case of contumacy by or refusal to obey a subpoena served upon, any person referred to in subsection (e) the district in which such person

is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

terms and conditions as the Administrator finds necessary to carry out, the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

Sec. 209. "For the purpose of any hearing or investigation provided for in sections 201-219 of this title, the provisions of Sections 49 and 50 of Title 15, are hereby made applicable to the jurisdiction, powers and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees."

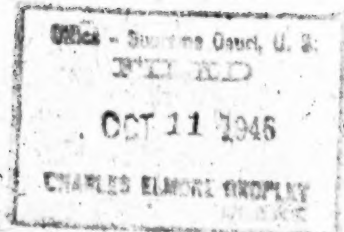
Sec. 49. "The Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners may administer oaths, etc."

"And in case of disobedience to a subpoena the Commission may invoke the aid of any

court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence."

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, etc. and any failure to obey such order of the court may be punished by such court as a contempt thereof."

FILE COPY



No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1946

**JAMES G. RALEY, AND THOMAS E. RALEY, TRADING
AS RALEY'S FOOD STORE, PETITIONERS**

v.

**PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

BRIEF FOR THE RESPONDENT IN PARTIAL OPPOSITION

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OPINION BELOW

The district court did not write an opinion. The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported (R. 16-18).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 17, 1946 (R. 19). The petition for a writ of certiorari was filed on September 16, 1946.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Emergency Price Control Act of 1942 authorizes the delegation by the Price Administrator to District Directors, of the authority to sign and issue subpoenas for purposes of the investigative functions authorized by Section 202 of the Act.

2. Whether a subpoena issued pursuant to Section 202 and calling for the production of the respondent grocery store's "books, records and sales slips showing sales of commodities subject to price control between January 1, 1945, and the date of this subpoena [August 2, 1945]" violates the search and seizure provisions of the Fourth Amendment or the due process clause of the Fifth Amendment.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and the applicable regulations involved appear in the Appendix, *infra*, pp. 9-13.

STATEMENT

Petitioners are owners and operators of a retail grocery store under the name of Raley's Food Store at 2331 Calvert Street NW., Washington, D. C. Pursuant to the investigative authority of

Section 202 of the Emergency Price Control Act a subpoena of the Office of Price Administration was issued to and served upon petitioners on August 2, 1945 (R. 6). The subpoena was signed by Robert K. Thompson, the District Director of the Office of Price Administration (R. 5). (Delegation to Regional Administrators and District Directors of the authority to sign and issue subpoenas had been made by Revised General Order 53, *infra*, pp. 12-13). The subpoena requested the petitioners to appear before F. L. Williamson, Enforcement Attorney of the Office of Price Administration at 5601 Connecticut Avenue NW., Washington, D. C., on August 6, 1945, 10:00 A. M., and to produce at that time and place, "all books, records and sales slips showing sales of commodities subject to price control between January 1, 1945, and the date of this subpoena [August 2, 1945]" (R. 5).

Petitioners appeared by counsel at the time and place specified but refused to produce the documents requested, asserting various arguments against compliance with the subpoena. Accordingly, as authorized by Section 202 (e) of the Act, the Administrator applied to the District Court for an order enforcing compliance with the subpoenas. The application recited the foregoing facts; that the documents requested by the subpoena were, at the time of issuance thereof, deemed by the applicant to be relevant and material to

the investigation; and that they were, on information and belief, in the possession and control of the petitioners (R. 2-4).

The answer filed by petitioners asserted that the subpoena was invalid because it was signed and issued by the District Director rather than the Administrator, and because the breadth of the subpoena was such as to violate the search and seizure provisions of the Fourth Amendment and due process clause of the Fifth Amendment (R. 7-9). An affidavit by appellants asserted that their business could not be conducted if all the documents requested were turned over, because they were needed in the daily conduct of the business; that the subpoena was therefore arbitrary, oppressive and unconstitutional (R. 10-11).

At the hearing before Judge Schweinhaut, counsel for petitioners suggested that if the Administrator gave the names of particular customer accounts, petitioners would turn over those records. The Court then asked counsel for the Administrator: "Is your office in a position to do any selection at all, Mr. Walker?" Counsel replied in the negative and went on to say: "We have reason to believe there are sales that are in violation of the Act, and under those circumstances we are entitled to make an investigation, and we can't possibly determine in advance to whom those sales were made. If it would help counsel or help the respondents, we would be

glad to go in and pick up invoices for just a week at a time, photostat them, and bring them back the next day. We will do anything to help, but we do insist on our rights to the records." (R. 12-13.)

The district court entered an order on November 19, 1945, ordering appellants to comply with the subpoena at 10 o'clock A. M. on November 27, 1945 (R. 13-14). Subsequently an order was entered staying the order for compliance, pending final disposition of the appeal. The United States Court of Appeals for the District of Columbia affirmed the judgment of the district court (R. 19).

ARGUMENT

1. The Government does not oppose the petition with respect to the issue raised as to the authority under the Act to delegate the function of signing and issuing subpoenas. The Government is petitioning for certiorari in *Porter v. Mohawk Wrecking and Lumber Co.*, decided by the Circuit Court of Appeals for the Sixth Circuit, August 12, 1946 (No. 583, this Term), which conflicts with the decision below on that point.

2. The Government does oppose the petition with respect to the second of the two questions presented. There is no conflict of decision on this issue, and, as the court below recognized, the matter is clearly governed by *Oklahoma Press*

Publishing Co. v. Walling; News Printing Co. Inc. v. Walling, decided February 11, 1946, Nos. 61, 63, October Term, 1945.

The latter decisions specifically treated the objections that the Administrator did not have "evidence of violations" in advance of the use of the subpoena, and that the subpoena was too sweeping in its terms. The Court (slip sheet, at pp. 10, 15-16) stated that:

* * * The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

* * * The requirement of "probable cause, supported by oath or affirmation" literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.

The subpoena here easily meets this test. The application for enforcement of the subpoena stated (R. 3) that "applicant, as Administrator for the Office of Price Administration, deemed that an investigation to determine whether James G. Raley and Thomas E. Raley, trading as Raley's Food Store, their agents and employees had or had not complied with the provisions of the Act and regulations issued thereunder was proper to assist him in the administration and enforcement of the Act and regulations and orders thereunder." Such an inquiry was clearly lawful under Section 202 of the Act. And the specification of documents pertaining (1) only to sales of commodities which were subject to price control, and (2) for a named eight month period of time, showed relevancy to the inquiry and adequacy of specification. Subpoenas at least as broad and covering much longer periods of time were sustained in the *Oklahoma Press Publishing and News Printing Co.* cases *supra*, as well as in *Wheeler v. United States* 226 U. S. 478; *Brown v. United States* 276 U. S. 134; *Nelson v. United States* 201 U. S. 92. Moreover, as the court below observed (R. 18), "Counsel for the Administrator assured the trial court that if it would help appellants he was ready to pick up only a week's invoices at a time, photostat them, and return them the next day. No greater concession to appellants' convenience could fairly be asked."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted, but limited to the issue of the Price Administrator's authority to delegate the function of signing and issuing subpoenas.

✓ J. HOWARD McGRATH,
Solicitor General.

✓ GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

✓ DAVID LONDON,
Director, Litigation Division,

SAMUEL MERMIN,
Solicitor, Litigation Division,
Office of Price Administration.

OCTOBER 1946.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App., Supp. V, Sec. 901 et seq.

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and pro-

motions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place * * *

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

SEC. 202. (a) The Administrator is authorized to make such studies and investigations, *to conduct such hearings,*¹ and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may,

¹ Added by sec. 105 (a) of the Stabilization Extension Act of 1944.

whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpoena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of ~~contumacy~~ by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpoenaed under this section shall be paid the same fees and mileage

as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

(i) *Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.*²

2. Provisions of Revised General Order 53 (9 F. R. 5191, May 13, 1944):

General Order 53 is amended and revised to read as follows:

Pursuant to the authority conferred upon the Administrator by the Emergency Price Control Act of 1942 as amended, the following order is prescribed:

(a) *Order delegating authority to sign and issue subpoenas and inspection requirements in rent and price investigations.—*
In connection with any investigation re-

² Added by Sec. 105 (b) of the Stabilization Extension Act of 1944.

lated to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation or order issued thereunder, the several Regional Administrators and the several District Directors of the Office of Price Administration are each authorized within their respective regions, or districts to sign and issue: (1) subpoenas requiring any person to appear and testify or to appear and produce documents, or both, at any designated place; (2) inspection requirements requiring any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodation, to permit the inspection and copying of records and any other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 13th day of May 1944.